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Supreme Court, U.S.
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No. 79-672

Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR THE UNION

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3 3 PRINTED IN U.S.A.

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BRIEF FOR THE UNION

The Brief For The National Labor Relations Board (hereinafter "Bd. Br.") sets out the opinions below, the basis of this Court's jurisdiction, and the statute involved. (See Bd. Br. 1-3.)

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether, under the rule stated in *Labor Board* v. *Fruit Packers*, 377 U.S. 58 (*Tree Fruits*) explicating § 8(b)(4)(ii)(B) of the National Labor Relations Act, unions may lawfully engage in peaceful consumer picketing confined to a struck product wherever the product is sold, or whether unions may engage in such picketing only if the struck product does not constitute a predominant portion of the seller's business?

2. If § 8(b)(4) does bar such picketing does the Section to that extent violate the First Amendment?

COUNTERSTATEMENT OF THE CASE

In 1974, Local 1001 of the Retail Store Employees Union, Retail Clerks International Association, AFL-CIO, became the certified collective-bargaining representative of certain employees of Safeco Title Insurance Company which underwrites title insurance in the State of Washington. Contract negotiations reached an impasse, and the employees went on strike and began picketing Safeco's office in Seattle. On various occasions thereafter, striking employees, acting on the Union's behalf, picketed the premises of one or more of five land title companies selling Safeco Insurance and having close business ties with Safeco.[1] The land title companies conduct real estate title searches, issue title insurance policies and perform escrow services. Safeco underwrites all of their policies, from which a predominant portion of their revenues are derived. (Pet. App. 50a-52a.)

The entirely peaceful picketing was directed solely to the general public. It did not result in any work stoppage or interference with deliveries. (Pet. App. 50a-51a.) (Indeed, the record does not show whether more than one picket appeared at any time.) And, as the Board recognized, the picketing sought "to persuade customers of the land title companies to refrain from purchasing [Safeco] insurance". (Pet. App. 52a.)

One of the land title companies filed secondary boycott

[1] Land Title Company of Clark County, Land Title Company of Cowlitz County, Land Title Company of Kipsap County, Land Title Company of Pierce County and Land Title Company of Snohomish County.

charges with the National Labor Relations Board and Safeco filed similar charges of its own. A complaint was issued by the Board's General Counsel and the parties stipulated the facts just summarized, waived intermediate proceedings before an administrative law judge and submitted the case directly to the NLRB for decision. (Pet. App. 47a-48a.)

The Board passed on two issues and concluded (3-2):

First, "The land title companies are neutral and separate employers with respect to Safeco's dispute with Respondent". (Pet. App. 56a.)

Second,

> Between 90 and 95 percent of the title companies' gross revenues is derived from the issuance of Safeco policis. * * * [Thus, the] land title companies, powerless to resolve the dispute, would be forced to cease doing business with Safeco or go out of business if the Union's consumer appeal were successful. We find, therefore, that Respondent's consumer appeal constitutes a coercion of neutral employers within the meaning of Section 8(b)(4)(ii)(B) of the [National Labor Relations Act, as amended]. [Pet. App. 59a.]

While the NLRB outlined other issues raised by its General Counsel and by Safeco (Pet. App. 52a-53a), the Board did not reach those contentions and specifically noted "In view of [our] determination, we find it unnecessary to pass on Charging Party Safeco's contention that the picket sign was improper". (Pet. App. 59a, n. 16.)

On the Union's petition for review, the court below, *en banc* (5-4), agreed with the Board on the neutrality issue (Pet. App. 6a-11a) but disagreed on the legality of the consumer picketing. That court held in the latter regard:

> The test of "threaten[ing], coerc[ing], or restrain-[ing]" which we thus distill from the Supreme Court's decision in [*Labor Board* v. *Fruit Packers*, 377 U.S. 58] *Tree Fruits* is whether the challenged picketing confines its appeal to the struck product in order to reduce the primary employer's market therefor, or whether the picketing projects its force beyond these boundaries. So measured, the activity in the instant case does not contravene the stricture of Section 8(b)(4)(ii)(B). [Pet. App. 26a.]

That court therefore remanded this proceeding to the Board noting "Our disapprobation of the order under review is without prejudice to such consideration as the Board may be inclined to give the pretermitted questions [raised by Safeco but not decided by the Board]." (Pet. App. 6a, n. 13 continued.)

The Board's petition for a writ of certiorari followed.[2]

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[2] Although Safeco continues to press its alternative theories for upholding the General Counsel's complaint (Brief of Safeco Title Insurance Company, 11-12 (hereinafter "Safeco Br.")) these arguments are not properly presented here since neither the Board nor the Court of Appeals passed on them. (*SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 and the other cases cited by the court below at Pet. App. 5a-6a, n. 13). Moreover, having chosen to oppose the Board's petition but not to cross-petition for certiorari on the "neutrality" issue, we do not, in light of the rule of *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n. 4, treat with that issue in this brief.

SUMMARY OF ARGUMENT

I

In *Labor Board* v. *Fruit Packers*, 377 U.S. 58 ("*Tree Fruits*") this Court held that §8(b)(4)(ii)(B) of the NLRA does not prohibit a union from peacefully picketing at a retail establishment selling a struck product confined to asking consumers not to buy that product. The Court of Appeals correctly held, reversing the Board, that under *Tree Fruits* such picketing does not transgress the Act simply because the establishment at which it occurs deals predominantly in the struck product. The lesson that court "distilled" from the *Tree Fruits* opinion is that so long as "the challenged picketing confines its appeal to the struck product in order to reduce the primary employer's market therefor" it is lawful, whereas "picketing [that] projects its force beyond those boundaries" is unlawful. (Pet. App. 26a.) In reaching that conclusion the court below undertook a meticulous and thoughtful study of the *Tree Fruits* opinion. And the Court of Appeals pointed out, *inter alia*, that the Board's approach, which focuses on the economic effect of the picketing on the retailer, resurrects the theory which had been advanced by the *Tree Fruits* Court of Appeals and which was expressly rejected by this Court.

The Board counters with two fragments from the legislative history, both of which were considered in *Tree Fruits* and neither of which illustrate a particular intent to proscribe predominant product picketing. The NLRB also relies on its own cases approved by several of the courts of appeals (including the court below) holding that consumer picketing against a "merged product" (a good that incorporates the struck product) is unlawful under *Tree Fruits*. But as the Court of Appeals explained, that result is not

inconsistent with the result that court reached here because in contrast to the instant situation, the "struck product * * * can not be pursued into the market for the merged product without implicating its other components." (Pet. App. 31a, n. 93).

Safeco ultimately argues that *Tree Fruits* should be reconsidered. But the company fails to do business with the reasoning of that opinion, advances nothing new in the legislative history, and can point to no subsequent developments which would justify a reinterpretation of the statute.

II

In *Tree Fruits* Mr. Justice Black concurred in the judgement on the ground that § 8 (b)(4)(ii)(B) as there construed by the Board worked a constitutionally impermissible discrimination against "free discussion of one side of a certain kind of labor dispute." (377 U.S. at 77.) In *Cox* v *Louisiana,* 379 U.S. 559, which involved a preference for labor picketing, Justice Black again concurred separately in invalidating the restraint imposed, invoking the same constitutional ground. That opinion was expressly approved in *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, which struck down an ordinance that prohibited all picketing near a school excepting only labor picketing:

> Necessarily, *** under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. [408 U.S. at 96.]

The Court has several times since reaffirmed the *Mosley* principle. (See, e.g. *Erznoznik* v. *City of Jacksonville,* 422

U.S. 205; *Madison School District* v. *Wisconsin Emp. Rel. Comm.,* 429 U.S. 167; *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765.)

These authorities require the conclusion that § 8(b)(4)(ii)(B) as construed by the Board impermissibly singles out for interdiction peaceful picketing by unions asking members of the public not to buy a disfavored product carried by a retailer from the same activity at the same place by any other organization. For this prohibition is discriminatory in two respects. First, there is nothing in reason, experience, or the legislative record that demonstrate that such picketing by unions has different consequences from picketing by everyone else. Second, the Section does not cover those selling the product, leaving them free to use every form of persuasion, including such comparable advertising techniques as large signs affixed to the premises, to convince shoppers to buy.

III

A. In defending the constitutionality of the Board's construction of § 8(b)(4)(ii)(B), the briefs on petitioner's side base their case entirely on the fact that the subject of regulation in this case is picketing. But it has been clear since *Thornhill* v. *Alabama,* 310 U.S. 88, and was recognized in *Mosley, supra,* 408 U.S. at 99, that "[p]icketing plainly involves expressive conduct within the protection of the First Amendment." Moreover, while this Court has in a series of cases sustained injunctions against picketing, it has made plain that "the mere fact that there is 'picketing' does not automatically justify its restraint without an invesigation into its conduct and purposes." (*Teamsters Union* v. *Vogt, Inc.,* 354 U.S. 284, 294-295).

B. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765,

defined "speech at the heart of the First Amendment's protection," by quoting *Thornhill*, which stated in part: "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matter of public concern without previous restraint or fear of subsequent punishment • • •." (310 U.S. at 101.) In *Thornhill*, that freedom was held to include the dissemination of information regarding the facts of a labor dispute. And *Thomas* v. *Collins*, 323 U.S. 516, held that the First Amendment protects a peaceful effort to persuade workers to action by joining a labor union.

C. The precedents in this Court establish further that legislation does not meet the "exacting scrutiny" standard applied to restrictions on free speech (*Bellotti*, 435 U.S. at 786) because it seeks to advance the economic interests of one group in the community by denying the general public truthful information concerning decisions the latter have the lawful right to make. The decisive decision is *Va. Pharmacy Bd.* v. *Va. Consumer Council*, 425 U.S. 748. The Court found the "justifications for the [price] advertising ban [at issue] • • • to be constitutionally insufficient" because "on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." (*id.* at 766, 769) This "highly paternalistic approach" was deemed incompatible with the very essence of the First Amendment. The Court expressly recognized that the state could prohibit price competition, but it could not permit businessmen an option between a low-price, limited-service policy and a high-price, full-service policy, recognize the consumer's freedom to choose between the two, and then attempt to further the interests of those who provide full-service at a high price by stemming the free flow of price information to consumers.

Va. Pharmacy Bd. was followed in *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, which held that the First Amendment does not "permit a municipality to prohibit the posting of 'For Sale' or 'Sold' signs when the municipality acts to stem what it perceives as the flight of white homeowners from a racially integrated community" (*id.* at 86) although "[t]here can be no question of the importance of achieving [the] goals • • • [of] stable racially integrated housing" (*id.* at 94).

D. The cases cited on the Board's side do not support the proposition that the constitutional rights declared in cases like *Va. Pharmacy Bd.* are forfeited because the means of communicating the information regarding the labor dispute to the public is a picket sign carried at a store which sells the struck product. The leading case in the line of authority on which our adversaries rely is *Giboney* v. *Empire Storage Co.*, 336 U.S. 490. The union there was engaged in picketing addressed to employees who were subject to discipline if they crossed the picket line; the object of the picketing was to cause those employees to refuse to pick up from or deliver goods to Empire in order to compel Empire to violate Missouri's criminal law by discontinuing business with nonunion peddlers. On these facts, picketing was indistinguishable from a verbal inducement to the employees to commit an illegal act by joining in the conspiracy in restraint of trade; as Justice Black stated (citing, *inter alia, Fox* v. *Washington*, 236 U.S. 273, and labor cases involving employer coercion of empiloyees), such verbal acts have never been protected by the First Amendment(336 U.S. at 501-502).

Our argument discusses in detail the decisions generated by *Giboney*. In *Giboney* the picketing invited an illegal act (the refusal by employees to deliver) in order to achieve an

illegal objective (Empire's refusing to deal with non-union peddlers). In *Electrical Workers* v. *Labor Board,* 341 U.S. 694 (which sustained the secondary boycott provision of the NLRA with respect to picketing addressed to employees), the picketing induced employees to engage in a strike which was itself an unfair labor practice under the same provision of the NLRA. These, we think, are constitutionally correct results. A different question is presented by cases such as *Hughes* v. *Superior Court,* 339 U.S. 460, where the picketing induces lawful conduct (there, the refusal by consumers to patronize a store) in order to accomplish an objective which is either prohibited, or contrary to public policy (there, to compel the employer to engage in racial quota hiring). We believe that in this latter class of cases the prohibition of picketing is far more questionable, particularly where the ultimate object, though against "public policy," is not enforced by any sanction, civil or criminal. But the point need not be decided since this case is at the opposite end of the spectrum from *Giboney.* (Cf. *United States* v. *12 200 Ft. Reels of Film,* 413 U.S. 123, 127.) For here the object of the picketing is contrary to public policy only in what Professor Cox has aptly called "the Pickwickian sense" that the Government has outlawed picketing to achieve that objective. No case in this Court has sustained such a ban on picketing, which would amount to a blanket prohibition forbidden since *Thornhill.*

All but one of the *Giboney* line of decisions involved picketing addressed to employees, and are distinguishable for that reason. The sole exception, which did involve picketing addressed exclusively to consumers, is *Hughes* v. *Superior Court,* 336 U.S. 490. We first suggest that *Hughes* may properly be confined to the "circumstances of th[at] case" (*id.* at 469), a *caveat* given point by the Court's most

recent consumer picketing case, *Teamsters Union* v. *Newell,* 356 U.S. 341, which summarily reversed a state court ban on consumer picketing, citing *Thornhill.*

We show next that, as Professor Cox has written, picketing addressed to consumers to publicize the existence of a labor disputes, as in this case, is significantly different from picketing which gives a "signal" to organized employees, as in *Giboney.*

We then discuss language in the *Hughes* opinion which contrasts the "compulsive features" of picketing with "appeals to reason". If this statement was intended to state a constitutional rule that only such appeals are entitled to the protection of the First Amendment, it is clearly wrong. The decision in *Cohen* v. *California,* 403 U.S. 15, and Justice Harlan's forceful reasoning therein, particularly, *id.* at 24-26, demonstrate the error beyond debate. (See also, *Spence* v. *Washington,* 418 U.S. 405, and *Linmark, supra.*) Moreover, Mr. Justice Frankfurter in this portion of the *Hughes* opinion did not engage in the "critical scrutiny" demand by accepted First Amendment principles, but invoked the far more expansive standard of the equal protection cases involving economic regulation.

Finally, we show that the *Hughes* opinion in its entirety rested not on First Amendment principles as they have been set down in subsequent cases, but on the standard of "ordered liberty" derived from *Palko* v. *Connecticut,* 302 U.S. 319. For that additional reason, *Hughes* cannot be regarded as presently authoritative. More specifically *Hughes* proceeded as if the "conduct" aspect of picketing could, for constitutional purposes, submerge its expressive content. Subsequent decision have adopted an entirely different approach, far more protective of the right

to communicate. (See *United States* v. *O'Brien*, 391 U.S. 367, 376-377.)

E. The prohibition of the picketing herein can not be sustained on the ground that other forms of publicity are not forbidden. While *Linmark* recognizes that this fact may be relevant, that case holds that it is not a constitutionally sufficient ground for forbidding one means of communication. Rather, it must be demonstrated that the alternatives are not materially less effective forms of communication, and that the regulation is truly directed to time, place and manner rather than content. (See 431 U.S. at 493-494.) Section 8(b)(4)(ii)(B), as construed by the Board, satisfies neither of these conditions.

ARGUMENT

I

CONSUMER PICKETING CONFINED TO THE STRUCK PRODUCT DOES NOT VIOLATE § 8(b)(4)(ii)(B) WHETHER OR NOT THAT PRODUCT CONSTITUTES A PREDOMINANT PORTION OF THE RETAILER'S SALES

As the Court of Appeals noted, the NLRB in this case "predicated its decision exclusively on the fact that Safeco Title Insurance predominated the [Land Title] Companies' sales". (Pet. App. 27a, n. 84). Because of this product predominance alone the Board claims that, in contrast to the result reached by this Court in *Labor Board* v. *Fruit Packers*, 377 U.S. 58 ("*Tree Fruits*"), the Union here committed an unfair labor practice when it followed the products of an employer with whom it had a labor dispute to retail outlets and asked members of the consuming public, *via* picket signs and handbills, to refuse to purchase those products.

According to the Board, a union's right to picket to seek support from potential consumers of a particular product turns on how the primary employer markets its products—through exclusive or near-exclusive outlets on the one hand, or through retailers who deal in the products of many producers on the other. For, on the Board's view of *Tree Fruits*, § 8(b)(4)(ii)(B) would forbid struck product picketing of retailers closely tied economically to the primary employer, while permitting such picketing where the retailer is merely a purchaser of the primary employer's product as one among many.

This determination, of course, operates in a manner obverse to what one would expect, given the basic focus of the secondary boycott prohibitions—"Congressional concern

over * * * pressure brought to bear * * * not 'upon the employer who alone is a party [to a dispute] but upon some third party who has no concern in it.' " (*NLRB* v. *Operating Engineers* 400 U.S. 297, 302-303.) For, as the facts of this and other cases, show,[3] a high degree of predominance of a single producer product in a retailer's stock is usually accompanied by other types of economic interdependence as

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[3] The Court of Appeals ruled that "while indubitably the relationship between Safeco and the land title companies exudes strong economic interdependence that is too little to vitiate the Board's conclusion on the factually varying and frequently complex status of neutrality" (Pet. App. 10a-11a). We do not challenge that portion of the decision below (See p. 4, n. 2 *supra.*) The fact that these companies are neutrals for purposes of § 8(b)(4)(B) means, for example, that an appeal by the Union in this case to their employees to strike in support of the Union in its dispute with Safeco would be a violation of § 8(b)(4)(i)(B). But this determination of neutrality, which is a prerequisite to *any* application of the secondary boycott provisions, does not mean that the precise relationship between the "neutral" and the primary is not pertinent in determining the reach of § 8(b)(4) in particular circumstances. (Cf. *Electrical Workers* v. *Labor Board,* 366 U.S. 667 (*General Electric*) (whether or not picketing at a primary employer's premises which induces employees of secondary employers working on the premises to respect the picket lines violates § 8(b)(4) depends on whether the "neutral" is "performing tasks unconnected to the normal operations of the struck employer." (*Id.* at 680).)

In this case, Safeco owns between 12% and 53% of the land title companies' stock. Each company has at least one director who is a Safeco officer, and one has two such directors. Moreover, the "Agency Contract" between Safeco and each of the companies grant Safeco such controls over the latters' business, as to whom and at what price policies may be issued. (See Pet. App. 3a-4a.)

Similarily, in *Steelworkers Local 14055 (Dow Chemical Co.)* 211 NLRB 649, enforcement denied 524 F.2d 853 (C.A.D.C.), vacated and remanded 429 U.S. 807, complaint dismissed on remand, 229

well with the primary employer.

This anomalous result derives from a view of *Tree Fruits* which, as the Court of Appeals recognized, may have some superficial support in selected "passages [in this Court's opinion] read in isolation" (Pet. App. 22a) but is in its underlying theory "totally at war with *Tree Fruits*". (Pet. App. 29a). For, contrary to the Board's suggestion, the *Tree Fruits* Court *did* hold that "so long as picketing is directed at the struck product, it is lawful regardless of [the] intended or foreseeable effect [of refusals to buy that product] on the neutral's total business" (Bd. Br. 15), and it *did not,* as the NLRB supposes, grant the Board the authority to examine the *economic* facts of each case to discover whether "the picketing is really calculated to induce customers not to patronize the neutral parties at all" (Pet. App. 58a).

A. The Board, and Safeco, approach this case as if this Court had intentionally created a paradox. *Tree Fruits,* they begin, was based upon a dichotomy between "consumer picketing to shut off all trade with the secondary employer" and "picketing which only persuades his customers not to buy the struck product". (See *Dow, supra,* 211 NLRB at

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N.L.R.B. 302, the "neutral" gasoline stations were all leased or subleased from Dow, the primary employer, in some instances at rents based on a percentage of gasoline sold; Dow provided various forms of financial assistance to the retailers, including assigning bank notes and assuming the cost of some equipment; and, in some instances, Dow exercised financial controls such as approving the amount of insurance and monetary reserves of the retailers. (211 NLRB at 650, 655 n.16 (dissenting opinion).) As the dissenting Board members in *Dow* noted, "These facts are of a type common where a retailer deals solely or principally in products supplied by another; they show the economic realities underlying their relation." (*Id.* at 655 n. 16.)

651.)[4] In this case, according to the Board and Safeco, that dichotomy exists, if at all, only in a trivial sense; where the struck product is virtually all of the secondary employer's trade, the two situations are not, as the *Tree Fruits* Court stated, "poles apart", but, rather, precisely congruent. They therefore contend that *Tree Fruits* cannot be controlling here, and that the Board is free "to make [its] own independent judgment as to whether the picketing is permissible under the Act," (*Dow, supra,* 211 NLRB at 651), by choosing one of the two *Tree Fruits* "poles". But, *Tree Fruits,* when read as a whole, *does* provide "the criterion distinguishing the permissible from the forbidden" (Pet. App. 23a) in the situation here, just as in the situation presented in that case.

The central issue in *Tree Fruits* was whether product-limited picketing can be said to "threaten, coerce or restrain" *in the sense Congress intended to use those terms* in § 8(b)(4)(ii). The Court approached this question, as it has necessarily always approached issues regarding the reach of § (8)(b)(4),[5] as one requiring sensitive understanding of the basic Congressional purpose—to avoid creating "a separate dispute with the secondary employer" (377 U.S. at 72). The Court concluded that:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. [*Id.*]

[4] The Board's opinion in this case was explicitly based on "the views expressed in the Board opinion in [*Dow.*]" (Pet. App. 58a, n. 15.) Because the Board's analysis in this case was consequently presented largely by reference to the fuller discussion in *Dow*, we refer liberally to the Board's *Dow* opinion in seeking to derive the rationale of the present decision.

[5] This Court has long recognized that "This provision could not be literally construed; otherwise it would ban most • • • lawful so-called primary activity." (*General Electric, supra,* 366 U.S. at 672; see also e.g., *Operating Engineers, supra,* 400 U.S. at 302-303.)

As an example of its meaning, the Court provided the following:

> If a public appeal directed only at a product results in a decline of 25% in the secondary employer's sales of that product, the corresponding reduction of his purchases of the product is due to his inability to sell any more. But if the appeal is broadened to ask that the public cease all patronage, and if there is a 25% response, the secondary employer faces this decision: whether to discontinue handling the primary product entirely, even though he might otherwise have continued to sell it at the 75% level, in order to prevent the loss of sales of other products. [*Id.*, n. 20]

As the Court of Appeals demonstrated, from this explication the basic parameters of the *Tree Fruits* rationale readily emerge. First:

> When the union's secondary picketing is no more than a request that consumers shun the struck product, any diminution of the commerce in the product between the primary and secondary employers is simply a reflection of the consuming public's reaction to the un-

> ion's limited appeal, geographically extended as it was from the primary to the secondary site. [Pet. App. 25a-26a.]

Plainly, it makes no difference in this regard whether the struck product is a large or small portion of the retailer's sales; in either case, the effect on the "neutral" comes about only because and to the extent that "the public has diminished its purchase of the struck product."

Second, Congress sought to preclude picketing that creates a separate dispute with the secondary employer because "when the picketing is utilized to induce customers to forsake the secondary employer completely he 'stops buying the struck product,' the *Tree Fruits* Court reminds, 'not because of a falling demand, but in response to pressure designed to inflict injury on his business generally.'" (Pet. App. 26a.) The *Tree Fruits* rule protects retailers from the economic consequences of the loss of other business, not from the economic consequences of falling demand for the struck product. The example given in *Tree Fruits,* and quoted above, makes this entirely lucid.

Third, read in this light, neither the "poles apart" dichotomy nor the other references in *Tree Fruits* to picketing which "persuades the customers to • • • stop all trading" invite the paradox which the Board attributes to that decision. Rather, it becomes apparent that the critical distinction drawn by *Tree Fruits* is between consumer picketing confined to the struck product and such picketing which goes beyond the struck product to encompass other items or services offered at the secondary situs.

This case fits squarely within the *Tree Fruits* rationale thus understood:

> The test of "threaten[ing], coerc[ing], or restrain-

> [ing]" which we thus distill from *Tree Fruits* is whether the challenged picketing confines its appeal to the struck product in order to reduce the primary employer's market therefore, or whether the picketing projects its force beyond these boundaries. So measured, the activity in the instant case does not contravene the stricture of Section 8(b)(4)(ii)(B). The union had struck and picketed Safeco, the purveyor of title insurance to the public through the land title companies. The union expanded the area of the picketing to include the premises of these companies, and that, for purposes of its decision, the Board took as activity tailored to persuading consumers to boycott Safeco insurance. While most of the companies offered little else—title searches and escrow services—there is no suggestion that the picketing was structured to affect anything but the struck insurance. The union seemingly was bent on drastically curtailing the market for that product, but that was all. [Pet. App. 26a-28a.]

In *Tree Fruits* the Court observed that the common law recognized the "distinction between picketing a secondary employer merely to 'follow the struck goods' and picketing designed to result in a generalized loss of patronage." (377 U.S. at 64, n. 7.) Given that recognition it is instructive that the most authoritative statement of the common law rule is formulated in terms that appear to pre-echo the *Tree Fruits* rule as explicated by the Court of Appeals. Section 799 of the A.L.I. Restatement of Torts (1939) states:

> Employees are not liable to their employer for harm caused by inducing third persons through fair persuasion and for a proper object to refrain, during their dispute with the employer, from
>
> (a) patronizing him or buying from any one else goods or services sold, produced or processed by him, • • •

The Comment thereto explains:

> • • • When the employer produces goods which are distributed by others, the effort to restrict his consumers' market in the manner stated in this Section may be extended to all persons who purchase the goods produced by him, whether the purchases are made from him directly or from others who distribute those goods. If, for example, A is the manufacturer of the X brand soap, employees may, under the rule stated in this Section, induce wholesalers, retailers and housewives not to purchase that soap. Within the limits of fair persuasion, they may do so by advertising in newspapers, by distribution of circulars, by picketing, and by any other means. If the fair persuasion is in the form of picketing, the pickets may be stationed wherever the soap is sold and they may there seek to persuade prospective purchasers. Thus, they may be stationed at A's factory or at B's retail store where the soap is sold. *In all these cases, however, the scope of the request must be limited to A and his products. If the request is so confined, A is not entitled to complain, since his loss of sales is due only to the fair persuasion of the prospective purchasers. B, the retailer, is also not entitled to complain, since the action is not directed at him and his loss of sales, if any, is due only to the diminution in the prestige of the goods which he buys and markets, a diminution which A's employees are privileged to cause* • • •. *If, however, the third persons are requested not to buy other goods from B because he sells A's soap, the rule stated in this Section is inapplicable* • • •; *for then B is being induced not to buy from A and his inducement is not by fair persuasion but by economic pressure. If he continues to market A's soap, he is threatened not merely with loss of sales of that soap but with loss of sales of other products having no relation to A. This is economic pressure on B, not involved in the previous example, to induce him not to buy from A* • • •. [Emphasis added.]

B. The NLRB not only misread the distinction the Court drew in *Tree Fruits,* but also adopted a theory explicitly *rejected* in that case—*viz,* that consumer picketing is illegal secondary activity if "a successful boycott • • • would predictably involve a virtually complete boycott of the [retailer] • • • [with] the predictable result of bringing the [retailer] into its dispute with • • • Safeco" (Pet. App. 59a.) The course of decision there makes the Board's error patent.

First, the *Tree Fruits* Court was reviewing a court of appeals opinion which had refused enforcement of the Board's unfair labor practice order on the ground that "the statutory requirement of a showing that respondents' conduct would 'threaten, coerce, or restrain' Safeway could only be satisfied by affirmative proof that a substantial economic impact on Safeway had occurred, or was likely to occur as a result of the conduct," (377 U.S. at 62), and had remanded the case to the Board for a factual determination of economic impact. This Court, in its decision, rejected not only the Board's pre-*Tree Fruits* thesis that *all* consumer picketing is coercive within the meaning of 8(b)(4)(ii), but also stated its "disagree[ment] with the Court of Appeals that the test of to 'threaten, coerce or restrain' is whether Safeway suffered or was likely to suffer economic loss," (*id.* at 72), and "remanded with direction to enter judgment setting aside the Board's order." As the court below noted, it is indeed "difficult to imagine a more explicit rejection of the economic-impact theory of prohibited coercion." (Pet. App. 30a.)[6] Yet the Board, in the face of

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[6] The Board's counsel protests that:

> The Court was not suggesting that the economic impact of the picketing would be irrelevant in other circumstances, where, as here, the struck product constituted substantially

this rejection, has read *Tree Fruits* as based solely upon the view that "the minimal impact picketing there would have had, if successful, upon the total business of the secondary retailer would not justify a conclusion that an object of the union was to persuade the retailed to discontinue handling the struck product to cut its losses," (*Dow, supra,* 211 NLRB at 651) and devised its present approach upon that entirely erroneous premise.

Second, the *Tree Fruits* Court was quite aware that at some level of economic impact, Safeway might have to "drop the [primary] item as a poor seller" (377 U.S. at 73) and thus cease doing business with the primary employer entirely, rather than merely to the extent of decreased demand. Nevertheless the Board now argues that in this case "[the Union's] activities therefore had the predictable result of dragging the land title companies into its dispute * * * [because the] companies * * * would be forced to cease doing business with Safeco or go out of business if the consumer appeal were successful." (Pet. App. 59a.) How this dynamic differs in any material respect from the "poor seller" example in *Tree Fruits* we are not told. The *Tree Fruits* Court did not assume that it was not a predictable result—or even an object—of the picketing economically

all of the neutral's business. Indeed, the Court emphasized that picketing of a neutral secondary violates Section 8(b)(4)(ii)(B) when it urges the public not to trade with him at all and thus seeks to inflict injury on his business generally (377 U.S. at 63-64, 72). [Bd. Br., 15.]

But, as we have seen, the emphasis in *Tree Fruits* upon injury to the retailer's business "generally" pertained not to the extent of foreseeable economic impact but to its character—*viz.,* to whether it extended beyond the struck product to "other products". Thus, the Court in *Tree Fruits* was not only "suggesting" but squarely *holding* that as long as the appeal was confined to the struck product, the economic effect on the retailer was irrelevant.

to influence the retailer to cease entirely dealing in the primary's products. Rather, as Judge Fahy noted in *Dow, supra,* the Court in *Tree Fruits* held that as long as the appeal is limited to the struck products there is no "separate" dispute but only a geographical expansion of the primary dispute:

> Thus, the Court did not say that the picketing in *Tree Fruits* did not threaten, coerce or restrain Safeway and therefore did not fall within the area Congress intended to prohibit by section 8(b)(4). The Court said that since the picketing was not conduct of the kind which Congress intended to prohibit by the provision, it followed that it did not threaten, coerce or restrain the secondary within the meaning Congress attached to the provision. It was not one of the "isolated evils" intended to be prohibited by section 8(b)(4). The Court viewed Congress as having determined that the possible loss to a secondary caused by this means of publicizing a labor dispute with the producer of the struck products, when weighed against a policy favoring the right peacefully to publicize the dispute, did not outweigh the right. [524 F.2d 853, 858-859.]

Third, the *Tree Fruits* Court explicitly noted the possibility that

> all picketing automatically provokes the public to stay away from the picketed establishment. The public will, it is said, neither read the signs, hand bills, nor note the explicit injunction that "This is not a strike against any store or market." [377 U.S., at 71].

Of this possibility, the Court said simply "[b]e that as it may," Congress did not intend to prevent such picketing. (*Id.*) The Court did not remand for a determination of whether such a result was likely—or even intended. The Court regarded an impact beyond the struck product as irrelevant as long as the Union does not seek such an im-

pact. Thus, even if one supposes that consumers are unlikely to enter a retailer's premises at all in response to product picketing where the struck product encompasses most but not all of a retailer's product, this too is a risk not different in principle from that which the Court recognized and accepted in *Tree Fruits*.[7]

C. The Court in *Tree Fruits* did not claim explicit Congressional approval of the struck goods/total boycott distinction. To the contrary, the Court recognized that "this distinction was [not] expressly alluded to in the debates." (377 U.S. at 64). Rather, the Court's premise was that, because of the caution stated in § 13 of the Act and because "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment" (*id.*, at 63), it would be inappropriate "to ascribe to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history' • • • that Congress intended to do so as regards the particular ends of the picketing under review." (*Id.*, at 63, quoting *Labor Board* v. *Drivers' Union*, 362 U.S. 274, 284.) The premise that constitutional considerations dictate caution in attributing to Congress an intent to proscribe peaceful picketing has been greatly reinforced rather than undermined in the years since *Tree Fruits* was decided. (See parts II & III *infra.*) Consequently, absent the surfacing of some piece of explicit legislative history which was ignored in *Tree Fruits*, the conclusion of that case that Congress did not intend to proscribe

[7] For this reason the Board's argument, invoking *Radio Officers* v. *Labor Board*, 347 U.S. 17, 45, that it may infer that the Union's objective was to shut off business entirely between Safeco and the title companies (Bd. Br. 14-15 & n. 10) merely repeats the discredited theory of the NLRB's *Tree Fruits decision.* (See 132 NLRB 1172, 1177-1178 reversed 377 U.S. 58.)

consumer picketing limited to a struck product stands as correct.

The Board points to two statements in Congress, one in the House and one in the Senate, which, it claims, illustrate a *particular* intent to proscribe predominant product picketing. (Bd. Br., 17). Neither demonstrates such an intent.

The import given to Congressman Griffin's statement escapes us entirely. Nothing in Congressman Griffin's colloquy with Congressman Brown (105 Cong. Rec. 15672-15673) refers expressly to a situation "where consumer picketing, *though confined to the struck plant*, nonetheless calls for a boycott of the neutral's total business." (Cf. Bd. Br. 17, emphasis added.) Indeed, there is no suggestion at all that the picketing described in that colloquy would be limited in its appeal to the struck product, much less that the struck product would also be the predominant product of the retailer. In fact, Congressman Griffin's statements there necessarily add nothing to the Board's case since he stated, not once but three times, the limitation that consumer picketing would be proscribed only "*if* the purpose of the picketing is to coerce or restrain the employer of that second establishment." Thus what is significant about this colloquy is that the co-sponsor of the bill was three times offered the chance to say, unconditionally, that all secondary consumer picketing was outlawed by his proposal—and he three times turned that chance aside. Only "*if*" the picketing were aimed at "coercing" the secondary employer would it be proscribed.

As to Senator McClellan's John Deere plow example (105 Cong. Rec. 6667), the court below noted:

> The Senator's statement indicates he was concerned with picketing aimed at disrupting the merchant's busi-

ness generally, not with a narrowly focused consumer boycott of the struck product. 105 Cong. Rec. 6667 (1959). For a similar understanding of the Senator's remarks, see *Tree Fruits, supra* note 32, 377 U.S. at 65-66, * * * [Pet. App. 28a, n. 85.] [8]

Thus the *Tree Fruits* Court's understanding that "the legislative history does not support the Board's finding" of a violation (377 U.S. at 71) is as applicable here as it was in that case.[9]

D. The Board's Brief goes on at length in an attempt to

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[8] It bears noting as well that Senator McClellan's remarks were with regard to his own proposed amendment to § 8(b)(4), which was worded quite differently from the final version. Specifically, his proposal was not limited, as is § 8(b)(4)(ii) as enacted, to activity to "threaten, coerce or restrain"; rather, it reached activities designed "to exert or attempt to exert any economic or other coercion against, *or offer any inducement to*" neutral employers. (105 Cong. Rec. 5970; emphasis added). Peaceful consumer picketing which decreases sales of a given product could well be termed an "inducement" to drop that product even though it is not properly termed "coercion." Thus, Senator McClellan's remarks are not really pertinent at all to the bill as finally enacted.

[9] The legislative history set out in Safeco's lengthy Appendix similarly does not detract either from the conclusion that *Tree Fruits* must be read to cover this case, or from the *Tree Fruits* result itself. Other than the McClellan and Griffin remarks discussed above, only Congressman LaFare's discussion, 105 Cong. Rec. 3511) refers directly to the situation where "the distributor handles only one line of fixtures". (Safeco Br. 9a.) That discussion, however, did *not* concern consumer picketing but, rather, a situation in which unions advised a secondary employer "that they will be *courting labor trouble* if they continue to use * * * fixtures made by the manufacturer who is having a labor dispute * * *". (*Id.*; emphasis supplied). And, Congressman LaFare, like Senator McClellan, was discussing not the language eventually adopted but a proposal not enacted which specifically forbid "picketing * * * where an object is * * * causing * * * any employer * * * to cease doing business with any other person." (105 Cong. Rec. 3510)

show that the decision below "is inconsistent with the same court's application of [*Tree Fruits*] in the 'merged product' situation." (Bd. Br. 18; see *id.* at pp. 18-20.) We do not fully understand the point made since the Board and lower court "merged product" decisions are not binding on this Court. But, in any event, Judge Robinson patiently and tellingly explained the "ready" distinction between this and the merged product cases:

> There is a decisionally-significant difference between a secondary employer's sales of a struck product in the form in which it leaves the primary employer, and sales by the secondary employer of goods or services into which the struck product has been so integrated as to lose its separate identity for all practical purposes. In the former situation, the primary employer and the secondary retailer cater to the same body of eventual consumers; the secondary retailer's immediate market is also the primary employer's ultimate market, and a union boycott can be structured to follow the struck product into that market without implicating any other product in the secondary employer's inventory. When, however, the struck product has been so blended with another product as to become an integral part of a materially different product, the primary employer and the secondary retailer no longer deal in the same product and share a common market. The struck product no longer has a market of its own, and it cannot be pursued into the market for the merged product without implicating its other components. The stark fact of the matter is that a discrete consumer boycott of the struck product, given its newly-acquired character, is simply not possible. See [137 U.S. App. D.C.] at 4, 401 F.2d at 955.

The decided cases vividly illustrate the contrast. In *Honolulu Typographical,* restaurant customers acceding to the union's supplication would have had to boy-

cott meals—products, of course, not supplied by the primary employer, the newspaper. Similarly, in *American Bread Co.* v. *NLRB,* 411 F.2d 147 (6th Cir. 1969), in order to boycott a struck product—bread—customers of picketed restaurants would have had to pass up meals that included bread, thus effectively spreading the boycott to products not encompassed by the dispute with the primary employer. In that case at bar, however, consumers were neither required nor requested to boycott any neutral product in order to honor the picketers' appeal. Neutral secondary employers are legally susceptible to consumer picketing under *Tree Fruits,* but only insofar as the boycott of the struck product does not spill over into other phrases of the secondary enterprise. In true merged-product cases, however, the notion that the struck product is being followed to the consumer becomes so tenuous as to lose touch with reality. *Honolulu Typographical Union 37* v. *NLRB, supra* note 70, 131 U.S. App. D.C. at 4. 401 F.2d at 955. [Pet. 31a-32a, n. 93.] [10]

Aside from repeating its argument below the Board's response is:

> [A]s shown above (pages 18-19), the statutory purpose of preventing a picketline appeal for a total boycott of the neutral's business can be thwarted as readily where the struck product retains its market as it can where it merges with another product to create a new market. Accordingly, the distinction drawn by the court below is irrelevant for purposes of Section 8(b)(4)(ii)(B). [Bd. Br. 20-21, n. 15.]

This response assumes the point at issue in this case—*viz.* whether Congress intended to ban a picket line appeal that causes a retailer to drop a prodominant product as a poor seller. (Compare *Tree Fruits,* 377 U.S. at 73.)

E. Without giving even lip service to the doctrine of *stare decisis,* Safeco urges that *Tree Fruits* "Should Be Reconsidered" (Safeco Br., 15; Heading), a soft euphemism for "overruled."

The Company argues, first, that "if anything is clear from the legislative history, it is that Congress intended to prohibit all secondary picketing." (Safeco Br., 16.) We submit that what is "clear" from the majority and dissenting opinions in *Tree Fruits* is that there is no direct evidence that the sponsors of what became the § 8(b)(4)(ii) intended to prohibit picketing directed solely at a struck product, and that reasonable men may differ as to whether such an intention could otherwise be discerned in the legislative history. As just noted, Safeco's lengthly exegesis on the legislative materials (Safeco Br. 1a-23a) adds nothing to the materials discussed in detail in the *Tree Fruits* opinions; and the Company does not acknowledge, much less do business with, the principles of construction that informed the Court's consideration of those materials. In sum, there is no more reason for the Court to revisit the issue of statutory interpretation which was so fully debated in *Tree Fruits* than there would be for reexamining

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[10] So too, in *Bennett* v. *Teamsters Local 456,* 459 F.Supp. 223 (S.D. N.Y.) the District Court in granting an injunction against consumer picketing because of its understanding that § 10(l) limited its role to determining whether there is "some significant possibility that the picketing here did violate the Act" did not decide whether the Board or the Court of Appeals had been correct in *Dow Chemical.* That court did, however, expressly "reject the Board's contention that Carvel's [the primary employer's] products are so 'merged' with the products of other supplies that the picketing here could not be confined to the struck product as was the picketing in *Tree Fruits*" and on that basis stated the case to be "unlike *American Bread Company* v. *NLRB* (6th Cir. 1969) 411 F.2d 147." (See 459 F. Supp. at 231, n. 17.)

any other precedent in which this Court has been divided over an issue of statutory interpretation.

Safeco's second point is "that it is extremely difficult to apply the *Tree Fruits* distinction in the real world of labor disputes." (Safeco Br. 16) In support of that assertion the Company cites *Dow Chemical, supra,* and the merged product cases such as *American Bread, supra.* But, as we have developed herein, there is no valid distinction in terms of the principle stated in *Tree Fruits* between the factual situation presented in *Tree Fruits* and that presented in *Dow* and the present case. In contrast, as Judge Robinson demonstrated below, in terms of the *Tree Fruits* principle consumer picketing directed against a merged product is different from the picketing here. And, of course, the Board's misunderstanding of *Tree Fruits* can not impeach that decision. Nor can the assumption that the opinion is susceptible to alternative interpretations; that is true of many, if not most, judicial opinions. It is also the norm, and thus not a basis for reconsideration, that a single precedent does not provide an automatic solution for every related problem that may arise, and that when a decision construing a statute draws a line, some conduct will be on one side of that line and therefore lawful and some conduct will be on the other and unlawful. (Cf. *General Electric, supra,* 366 U.S. at 674: "However difficult the drawing of lines more nice than obvious, the statute compels the task.").

Lastly, Safeco argues at considerable length that "Secondary Consumer Picketing Inevitably Calls for a General Boycott of the Neutral" (Safeco Br. 17; Heading), stating that "a union picket line, without regard to the language of the picket signs, is an overt call not to cross the picket line" (*id.* at 18). For this assertion regarding "the realities

of union picketing" (*id.* at 17) Safeco cites no empirical studies, but only the views of three law review commentators (*id.* at 18 n. 17). The NLRB, on the other hand, recognizes that the language on a picket sign *is* significant. Thus, for example, one of the familiar *Moore Drydock* standards for lawful picketing at a common situs is that "the picketing discloses clearly that the dispute is with the primary employer." (*Sailors' Union of the Pacific,* 92 NLRB 545, 549.) Nor has the Board stated, in its original *Tree Fruits* decision or subsequently, that *consumers* do not take picket signs at face value, but read all of them as an invitation not to enter the premises. In *Tree Fruits* the Board's theory of illegality was that persuading customers not to purchase non-union apples would result in a decision by the retailers not to purchase those apples from the struck employees (See 132 NLRB 1172, 1177.) We submit that the assumption that persons reading a picket sign will treat it as meaning something different from what it says is entirely too arbitrary to be a basis of judicial decision, let alone for overruling the precedent established by this Court in *Tree Fruits.*

II

§ 8(b)(4)(ii)(B) AS CONSTRUED BY THE BOARD CONTRAVENES THE FREE SPEECH/EQUAL PROTECTION PRINCIPLE ESTABLISHED BY THIS COURT'S DECISIONS

Mr. Justice Black concurred in the judgment of the Court in *Tree Fruits,* not on the statutory ground stated in the majority opinion and just discussed, but on the ground that forbidding "striking employees of one business to picket the premises of a neutral business where the purpose of the picketing is to persuade customers of the neutral business not to buy goods supplied by the struck employer * * * abridges freedom of speech and press in violation of the First Amendment." (377 U.S. at 76.) He reasoned:

> [I]t is difficult to see that the section in question intends to do anything but prevent dissemination of information about the facts of a labor dispute—a right protected by the First Amendment. * * *
>
> The statute in no way manifests any government interest against patrolling as such, since the only patrolling it seeks to make unlawful is that which is carried on to advise the public, including consumers, that certain products have been produced by an employer with whom the picketers have a dispute. All who do not patrol to publicize this kind of dispute are, so far as this section of the statute is concerned, left wholly free to patrol. Thus the section is aimed at outlawing free discussion of one side of a certain kind of labor dispute and cannot be sustained as a permissible regulation of patrolling. Cf. *Carlson* v. *California,* 310 U.S. 106, 112.
>
> Nor can the section be sustained on the ground that it merely forbids picketers to help carry out an unlawful or criminal undertaking. Compare *Giboney* v. *Empire Storage & Ice Co., supra.* * * * [I]t is clear that the object of the picketing was to ask Safeway customers to

> do something which the section itself recognizes as perfectly lawful. Yet, while others are left free to picket for other reasons, those who wish to picket to inform Safeway customers of their labor dispute with the primary employer, are barred from picketing—solely on the ground of the lawful information they want to impart to the customers.
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> [I]t is clear that the object of the picketing was to ask Safeway customers to do something which the section itself recognizes as perfectly lawful. Yet, while others are left free to picket for other reasons, those who wish to picket to inform Safeway customers of their labor dispute with the primary employer, are barred from picketing—solely on the ground of the lawful information they want to impart to the customers. [377 U.S. at 78-79.]

Justice Black returned to the same point in his concurring opinion in *Cox* v. *Louisiana,* 379 U.S. 559:

> The Louisiana law against obstructing the streets and sidewalks, while applied here so as to convict Negroes for assembling and picketing on streets and sidewalks for the purpose of publicly protesting racial discrimination, expressly provides that the statute shall not bar picketing and assembly by labor unions protesting unfair treatment of union members. * * *
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> * * *
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> [B]y specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the

> streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment. [379 U.S. at 580-581.]

Police Department of Chicago v. *Mosley,* 408 U.S. 92, brought to this Court another regulation which distinguished between picketing by labor unions and picketing by others. The *Mosley* Court, in an opinion by Mr. Justice Marshall, invalidated the Chicago ordinance in question because:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. * * * To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. * * *
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the fields of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assemblying or speaking on the basis of what they intend to say. Selective exclusions from a

> public forum may not be based on content alone, and may not be justified by reference to content alone. [408 U.S. at 95-96.]

The Court quoted the portion of Mr. Justice Black's concurring opinion in *Cox* set out above (at p. 33) and stated "We accept Mr. Justice Black's quoted views. Cf. *NLRB* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 76 (1964) (Black, J., concurring)."

As Mr. Justice Powell explained in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 215:

> This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See, *e.g., Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488-489 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Moseley,* 408 U.S., at 95. Thus, "under the Equal Protection Clause, not to mention the First Amendment itself," *id.,* at 96, even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions. See also *Cox* v. *Louisiana,* 379 U.S. 559, 581 (1965) (opinion of Black, J.). Cf. *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

Finally, in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, which involved "a state criminal statute that forb[ad] certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals" (*id.* at 767), Mr. Justice Powell, again speaking for the Court, reaffirmed:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. [435 U.S. at 784-786; footnotes omitted.]

And in considering and rejecting Massachusetts' argument that the provision "protect[ed] corporate shareholders, an interest that is both legitimate and traditionally within the province of state law" (*id.* at 792), the Court added:

> The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject. Indeed, appellee has conceded that "the legislative and judicial history of the statute indicates . . . that the second crime was 'tailor-made' to prohibit corporate campaign contributions to oppose a graduate income tax amendment." Brief for Appellee 6.
>
> Nor is the fact that § 8 is limited to banks and business corporations without relevance. Excluded from its provisions and criminal sanctions are entities or organized groups in which numbers of persons may hold an interest or membership, and which often have resources comparable to those of large corporations.

> Minorities in such groups or entities may have interests with respect to institutional shareholders in a corporation. Thus the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and and other associations undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered by § 8. [435 U.S. at 792.]

This line of authority requires the conclusion that § 8(b)(4)(ii)(B) as construed by the Board impermissibly singles out for interdiction peaceful picketing by unions asking members of the public not to buy a disfavored product carried by a retailer *from the same activity at the same place by any other organization.* For this prohibition is discriminatory in two respects. First, there is nothing in reason, experience, or the legislative record that demonstrates that such picketing by unions has different consequences from picketing by everyone else. Second, the Section does *not* cover those *selling* the product, leaving them free to use every form of persuasion, including such comparable advertising techniques as large signs affixed to the premises, to convince shoppers to buy. The principle stated by Mr. Justice Black in *Tree Fruits* itself, adopted by the Court in *Mosley* and elaborated in *Bellotti* squarely precludes such discrimination.

Even though Justice Black's *Tree Fruits* opinion makes it plain that the free speech/equal protection principle is the first Constitutional requirement that the Board's order here must pass and despite our reliance below on *Mosley* and its progeny, Safeco's elaborate argument on the Constitutional phase of this case does not even acknowledge that principle. And the Board's sole response to *Mosley* is that:

> [T]he Court [there] held that no valid legislative purpose was served by broadly prohibiting all picketing near schools, while exempting peaceful labor picketing, since there was no basis for the city's claim that nonlabor picketing is more apt to produce violence than labor picketing (408 U.S. at 100-102). Here, by contrast, there is a valid legislative purpose in prohibiting unions from using secondary boycotts to enmesh neutrals in labor disputes not their own. The First Amendment, of course, "does not command 'that people who want to [voice] their views have a constitutional right to do so whenever and however and wherever they please.' " *Madison School District* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167, 178 (1976) (concurring opinion of Mr. Justice Brennan), quoting *Adderley* v. *Florida,* 385 U.S. 39, 48 (1966). [Bd. Br. 24-25; footnote omitted.]

But *Madison School District* follows *Mosley* and supports our position.[11] The Chief Justice's opinion for the Court recognizes:

> Regardless of the extent to which true contract negotiations between a public body and its employees may be regulated—an issue we need not consider at this time—the participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and head the views of citizens, it may not be required [by the State] to discriminate between speakers on the basis of their employment, or the content of their speech. See *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 96 (1972). [429 U.S. at 175-176; footnotes omitted.]

[11] In *Madison School District:*

> The question presented [was] whether a State may constitutionally require that an elected board of education prohibit teachers, other than union representatives, to speak at open meetings, at which public participation is permitted, if such speech is addressed to the subject of pending collective-bargaining negotiations. [429 U.S. at 169.]

That question was answered, "No".

Mr. Justice Brennan, in his concurring opinion, agreed with that point. The portion of his opinion quoted by the Board is part of his demonstration that: "[T]he Wisconsin Supreme Court was correct in stating that there is nothing unconstitutional about legislation commanding that in close bargaining sessions a government body may admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees." (*id.* at 178.) Justice Brennan then went on to stress:

> But the First Amendment plays a crucially different role when, as here, a government body has either by its own decision or under statutory command, determined to open its decisionmaking processes to public view and participation. In such case, the state body has created a public forum dedicated to the expression of views by the general public. "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 96 (1972). [429 U.S. at 178-179; footnote omitted.]

No tenet of First Amendment jurisprudence is more firmly established than that the public streets fronting commercial establishments are a "forum opened up to assembly and speaking."

III

§ 8(b)(4)(ii)(B) AS CONSTRUED BY THE BOARD CONTRAVENES THE FREE SPEECH PRINCIPLES ESTABLISHED BY THIS COURT'S DECISIONS

The free speech/equal protection principle just discussed is, we believe, dispositive. But § 8(b)(4)(ii)(B) as construed by the Board violates the First Amendment, the anti-discrimination principle aside.

A. *Introduction*

In defending the constitutionality of the Board's construction of § 8(b)(4)(ii)(B) the briefs on petitioner's side base their case entirely on the fact that the subject of regulation in this case is picketing. But a prohibition justified by the "epithet" "picketing" like all such prohibitions based on "mere labels" such as "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business and the various other formulae for the repression of expression that have been challenged in this Court, can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (*New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269 (footnotes omitted).) For, as this Court recognized in *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 99:

> [P]icketing plainly involves expressive conduct within the protection of the First Amendment, see, *e.g., Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Teamsters Union* v. *Newell,* 356 U.S. 341 (1958); *Garner* v. *Louisiana,* 368 U.S. 157, 185 (1961) (Harlan, J., concurring in judgment); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Cox* v. *Louisiana,* 379 U.S. 536 at 546; (1965); *Food Employees* v. *Logan Valley,* 391 U.S. 308, 314-315 (1968); *id.,* at 337 (White, J., dissenting); *Gregory*

> v. *Chicago,* 394 U.S. 111, 112 (1969); *Shuttlesworth* v. *Birmingham,* 394 U.S. [147] at 155 (1969 * * *.

Moreover, while this Court has, as the Board observes, sustained injunctions against "picketing aimed at preventing effectuation of a constitutionally permissable legislative policy" (Bd. Br. 22, citing *Teamsters Union* v. *Vogt, Inc.,* 354 U.S. 284), the Court in that very case took pains to make clear that:

> Of course, the mere fact that there is "picketing" does not automatically justify its restraint without an investigation into its conduct and purposes. State courts, no more than state legislatures, can enact blanket prohibitions against picketing [354 U.S. at 294-295]

It could hardly be otherwise, since, as the Chief Justice recently wrote for a unanimous Court:

> A legislature apppropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified. [*Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 844.]

Indeed, with a single exception, the cases on which the briefs on the other side rely involved picketing by unions which was addressed, in whole or in part, to *union members subject to union discipline* urging them not to enter a premises, not to perform services or not to make deliveries. Thus, for example, in *Giboney* v. *Empire Storage Co.,* 336 U.S. 490, the decision which *Vogt* termed the "decisive reconsideration" of picketing doctrine (354 U.S. at 281), the Court emphasized that

> Empire Storage and Ice Company['s] * * * place of business was * * * picketed by union members [whose] complaint registered against Empire, as indicated by placards carried by the pickets, was its continued sale of ice to non-union peddlers.
>
> * * *
>
> About 85% of the truck drivers working for Empire's customers were members of labor unions. These union truck drivers refused to deliver goods to or from Empire's place of business. Had any one of them crossed the picket line he would have been subject to fine or suspension by the union of which he was a member. [336 U.S. at 492-493.]

And the final paragraph of the *Giboney* opinion makes plain that it was this factor that persuaded the Court that there "was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making [Missouri's anti-trust] policy a dead letter" (*id.* at 503), and "that appellants were doing more than exercising a right of free speech or press" (*id.*). Mr. Justice Black there concluded:

> Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. *The union has provided for enforcement of its rule by sanctions against union members who cross picket lines.* We hold that the state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not to apply its anti-trade-restraint law to groups of workers, businessmen or others. [336 U.S. at 504; emphasis added.]

The one case in this Court sustaining a ban on picketing directed to consumers is *Hughes* v. *Superior Court*, 339 U.S. 460. Because of our adversaries' heavy reliance on *Hughes*,

we shall discuss that decision in detail on pages 64 to 78, *infra*. It sufficies at the outset to recall that while they treat *Hughes* as if it resolved all questions regarding the constitutionality of bans against picketing addressed to consumers, that case concludes by noting:

> The injunction here was drawn to meet what California deemed the evil of picketing to bring about proportional hiring [which California deemed an unlawful form of racial discrimination]. We do not go beyond the circumstances of the case. Generalizations are treacherous in the application of large constitutional concepts. [339 U.S. at 469.]

That *caveat* is given point by the Court's most recent consumer picketing case, *Teamsters Union* v. *Newell*, 356 U.S. 341 (*per curiam*) which summarily reversed a state court ban on consumer picketing citing "*Thornhill* v. *Alabama*, 310 U.S. 88, 98 *Third.*" That portion of *Thornhill* begins:

> *Third.* Section 3448 has been applied by the state courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor, the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer. * * * The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the termi-

nology used in noting the public of the facts of the dispute. [310 U.S. at 98-99, footnotes omitted.]

And, of course, that restriction was declared "invalid on its face." (*Id.* at 101.)

Thus this Court has never upheld a total ban on peaceful picketing directed to the general public seeking support for an entirely lawful end. Nor should it do so now.

B. *Speech Concerning The Merits Of A Labor Dispute Is At The Heart Of The First Amendment's Protection*

In *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, the Court defined "speech at the heart of the First Amendment's protection" by quoting *Thornhill* and applying its lessons:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matter of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U.S. 88, 101-102 (1940).

The referendum issue that appellants wish to address falls squarely within this description. In appellants' view, the enactment of a graduated personal income tax, as proposed to be authorized by constitutional amendment, would have a seriously adverse affect on the economy of the State. See n. 4, *supra.* The importance of the referendum issue to the people and government of Massachusetts is not disputed. Its merits, however, are the subject of sharp disagreement. [435 U.S. at 776-777.]

The paragraph in *Thornhill* following the one quoted in *Bellotti* specifies the "issues * * * embrace[d in] freedom of discussion" in a manner that speaks directly to the question presented in the instant case:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C. I. O.,* 307 U.S. 496; *Schneider* v. *State,* 308 U.S. 147, 155, 162-63. See *Senn* v. *Tile Layers Union,* 301 U.S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U.S. at 478): "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." [310 U.S. at 102-103.]

In Re Primus, 436 U.S. 412, adds the following insight:

> Appellant's letter of August 30, 1973, to Mrs. Williams [communicating an offer of free assistance by attorneys associated with ACLU] thus comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. See n. 32, *infra.*; cf. *Bates* v. *State Bar of Arizona,* 433 U.S., at 364; *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 779-780 (1976) (STEWART, J., concurring). As *Button* indicates, and as appellant offered to prove at the disciplinary hearing, see n. 9, *supra,* the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants. " 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins,* 323 U.S. 516, 537 (1945). The First and Fourteenth Amendments require a measure of protection for "advocating lawful means of vindicating legal rights," *Button,* 371 U.S., at 437, * * *. [436 U.S. at 431-432.]

In *Thomas* v. *Collins,* the effort to "persuade to action" upheld against state restriction was a "speech [whose] whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members." (323 U.S. at 533.)

Commercial activity generates not only a stream of goods and services but a series of significant social issues. Businessmen are both participants in the public dialogue and its subject. Their decisions—concerning such matters as collective bargaining, equal employment opportunity, the use and preservation of natural resources, the maintenance

of the environment, the location of facilities in one area of the country or another or in a foreign country, the doing of business with repressive regimes, support for or opposition to government action—directly and immediately affect each of us.

The precedents just reviewed make it plain that precisely because that is so, speech on these subjects, including speech designed to persuade to action, is "at the core of the First Amendment's protective ambit" (*Primus,* 436 U.S. at 424) and the "constitutionality of any prohibition * * * turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech" (*Bellotti,* 435 U.S. at 786).

C. *Speech May Not Be Restricted In Order To Protect The Economic Interests Of One Group From The Lawful Decisions Of An Informed Public.*

The precedents in this Court establish further that legislation does not meet the "exacting scrutiny" standard because it seeks to advance the economic interests of one group in the community by denying the general public truthful information concerning decisions the latter have the lawful right to make. The decisive decision is *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 425 U.S. 748. The Court there began:

> Our question is whether speech which does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U.S. at 385, is so removed from any "exposition of ideas," *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942), and from " 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the admin-

> istration of Government,' " *Roth* v. *United States,* 354 U.S. 476, 484 (1957), that it lacks all protection. Our answer is that it is not. [425 U.S. at 762.]

After summarizing the "substantial individual and societal interests" (*id.* at 766) in the free flow of price information (see *id.* at 762-765), the Court surveyed the "justifications for the [price] advertising ban [at issue which] have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists" (*id.* at 766; see *id.* at 766-768). Those justifications were found to be constitutionally insufficient because "on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance":

> It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what. [425 U.S. at 769.]

This justification for a restriction on speech was deemed incompatible with the very essence of the First Amendment:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. [*Id.* at 770.]

As the Court was quick to add, "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. *Parker* v. *Brown,* 317 U.S. 341 (1943)." (425 U.S. at 770.) Thus, *while the State can prohibit price competition,* it *cannot* permit businessmen an option between a low-price, limited-service policy and a high-price, full-service policy, recognize the consumer's freedom to choose between the two, and then attempt to further the interests of those who provide full-service at a high price by stemming the free flow of price information to consumers. However else the State may regulate commercial conduct, it may not do so by regulating free speech in order to insulate from the public's informed judgment the class of businessmen who select one of the options open under State law.

Indeed, as the Court recognized in *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, the First Amendment does not "permit a municipality to prohibit the posting of 'For Sale' or 'Sold' signs when the municipality acts to stem what it perceives as the flight of white homeowners from

a racially integrated community" (*id.* at 86) although "[t]here can be no question of the importance of achieving [the] goals * * * [of] stable racially integrated housing" (*id.* at 94):

> The Township Council here, like the Virginia Assembly in *Virginia Pharmacy Bd.*, acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." *Virginia Pharmacy Bd.* denies government such sweeping powers. [431 U.S. at 96-97] [12]

The analysis in *Va. Pharmacy Bd.* began with the point "The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits

[12] See also *Bates* v. *State Bar of Arizona*, 433 U.S. 350. (The "publication in a newspaper of [a lawyer's] truthful advertisement concerning the availability and terms of routine legal services * * * may not be restrained." (*Id.* at 384).)

of the dispute in order to influence its outcome." (425 U.S. at 762.) The Court also noted:

> The speech of labor disputants, of course, is subject to a number of restrictions. The Court stated in *NLRB* v. *Gissel Packing Co.*, 395 U.S. [575] 618, for example, that an employer's threats of retaliation for the labor actions of his employees are "without the protection of the First Amendment." [425 U.S. at 263, n.17.]

And, on that basis the Court there put to one side the "complex subject *** of restrictions upon speech in the special context of labor disputes". (*Id.*)

In *Gissel,* Chief Justice Warren had stated:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting *** [and] take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. [395 U.S. at 617.]

That statement provided the ground on which the rule quoted by the *Va. Pharmacy Bd.* Court rests. (The *Gissel* analysis foreshadows that of *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447 "where [the Court] upheld disciplinary action taken against an attorney who solicited accident victims for the purpose of obtaining remunerative employment *** [as] so inherently conducive to fraud and overreaching as to justify its prohibition" (*Schaumburg* v. *Citizens for Better Environ.* (No. 78-1335; Feb. 20, 1980) Sl. Op. p. 17, n. 11.)) [13]

[13] Safeco's argument that the message on a picket sign urging consumers not to buy a struck product is necessarily "misleading" (Safeco Br. 26) is wholly baseless (see pp. 30-31, *supra*). Accordingly

When picketing is addressed to union members who are subject to discipline if they fail to respect the picket line, the Court has employed the same analysis as in *Gissel* (See *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 493, 504 discussed at pp. 54-57, *infra*, which cites *Virginia Electric Co.* v. *Board*, 319 U.S. 533, 539 & *Thomas* v. *Collins*, 323 U.S. 516, 536, 537, 538, 539-540.) *Giboney* indeed quotes from the following passage in *Thomas* v. *Collins* very much in point here:

> [D]ecision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. *** When to his persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. *** But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection. [323 U.S. at 537-538.]

Certainly then, *Va. Pharmacy Bd.*'s approach to the constitutional protection offered "speech which does 'no more

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even if the communication here is given no greater protection than commercial speech, the ban on picketing here cannot be justified on any "truth" test such as that permitted under *Bates* v. *Arizona State Bar Assn.*, 433 U.S. 350, 380 and as applied in *Friedman* v. *Rogers*, 440 U.S. 1, 12-16. And, if its protection is not so limited, the total answer is given by *Bellotti:*

> ***[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. *Wood* v. *Georgia* [370 U.S. 375,] 388. [435 U.S. at 791-792.]

than propose a commercial transaction' " (425 U.S. at 762) *does* apply to speech by a union informing the *general public* (over whom the union has no control) "on the merits of a [labor] dispute in order to influence its outcome" (*id.*).

In the light of these decisions § 8(b)(4)(ii)(B) as construed by the Board can not be validated under the First Amendment on the ground that the Government may protect "neutral" persons who choose to deal in struck goods from informed consumer decisions not to buy such goods. There can be no principled basis for attributing to the Government greater power to suppress attempts to inform the general public that Safeco Insurance is a struck product, coupled with a request not to buy, than to suppress information in order to preserve a racially integrated community (*Linmark*) or to protect "professional" pharmacists (*Va. Pharmacy Bd.*). Consumers who base their buying decisions on their judgment as to whether the seller's business practices are constructive or anti-social, like consumers who buy on the basis of the price or quality of the product, act entirely within their rights. The premise of *Va. Pharmacy Bd.* is that since the consumer has a right to choose he has a correlative right protected by the First Amendment to receive information pertinent to that choice. And, the Court there made it plain that this First Amendment right is not overcome by the state's concern that the informed consumer will make a choice that harms the commercial interests of certain competitors in a free market.

D. *An Appeal To Consumers Not To Buy a Struck Product Does Not Lose Its Constitutional Protection Because It Is Conveyed By Picket Signs*

1. We demonstrated in the preceding section that an appeal to consumers not to buy a struck product, or to take

some other action which they may lawfully do, is a communication protected by the First Amendment. The briefs on petitioner's side do not contest that proposition. Their arguments in support of the constitutionality of § 8(b)(4)(ii)(B) as construed by the Board in this case rest entirely on the fact that, as so construed, Congress has prohibited the communication of that message to consumers only by picketing. If this Court had held, for any reason, that picketing is not entitled to the protections of the First Amendment, that argument would, of course, be decisive. But this Court has never so held. (See pp. 40-44, *supra*.)

As we also noted there, *Giboney* v. *Empire Storage Co.*, *supra*, 336 U.S. 490, is the leading case in the line of authority which sustained certain regulations of picketing. In rejecting the contention that the picketing could not constitutionally be enjoined "because the picketers were attempting peacefully to publicize truthful facts about a labor dispute", (*id* at 497-498) Justice Black stressed that:

> [T]he record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.
>
> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. Nothing that was said or decided in any of the cases relied on by appellants [e.g. *Thornhill*] calls for a different holding. [336 U.S. at 498]

Later in his opinion, Justice Black reiterated that the conclusion the Court reached was in accord with well-established First Amendment principles:

> We think the circumstances here and the reasons advanced by the Missouri courts justify restraint of the picketing which was done in violation of Missouri's valid law for the sole immediate purpose of continuing a violation of law. In holding this, we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. *Bridges* v. *California*, 314 U.S. 252, 263. States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances. *Schneider* v. *State*, 308 U.S. 147, 162. But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. *Virginia Electric Co.* v. *Board*, 319 U.S. 533, 539; *Thomas* v. *Collins*, 323 U.S. 516, 536, 537, 538, 539-540. Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. *Thomas* v. *Collins*, *supra*, at 547. For the placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated,

> evidenced, or carried out by means of language, either spoken, written, or printed. See *e.g., Fox* v. *Washington,* 236 U.S. 273, 277; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society. [336 U.S. at 501-502]

In sum, the determination that the picketing was not constitutionally protected rested on a combination of two factors: First, the picketing sought two classes of illegal acts—Empire's violation of Missouri's criminal law prohibiting restraints of trade and the participation of union members in the same conspiracy.[14] Second, the picketing was addressed to union members who were subject to loss of their membership if they did not honor a picket line. (See *id.* at 493 & 504 quoted at pp. 41-42, *supra.*) While the illegality of the objective was necessary to the constitutional result, it was not sufficient. For, if the union members had not been subject to discipline for crossing a picket line, there would not have been "clear danger, imminent and immediate, that unless restrained [the union] would make [Missouri's] policy a dead letter insofar as purchases by non-union [peddlers] from Empire and other distributors was concerned. (*Id.* at 503). Mr. Justice Black would not have tolerated an infringement of speech on any lesser

[14] Of course, one unlawful object is sufficient, if the appeal by its nature meets *Giboney's* clear, imminent and immediate danger test. But it sharpens analysis of *Giboney's* progeny to bear in mind that the objective may be unlawful because it induces employees to engage in an illegal strike, or because its ultimate object is to require a third person to engage in an illegal act.

showing.[15] On the other hand, on the principle stated in *Giboney* if it had been lawful for the union members to concertedly refuse to deliver goods to or from Empire's place of business and for Empire to refuse to deal with the non-union peddlers, there would have been no constitutional justification for prohibiting an instruction to that effect. On that principle the Board's order here can not stand. For it is entirely lawful for consumers to refuse to buy a struck product and for retailers to refuse to carry such a product.

2. In the Term following *Giboney,* "the Court decided a group of cases applying and elaborating on the theory" of that decision (*Vogt,* 354 U.S. at 292). The trilogy of 1949 Term cases (*Hughes* v. *Superior Court,* 339 U.S. 460; *Teamsters* v. *Hanke,* 339 U.S. 470; *Building Service Union* v. *Gazzam,* 339 U.S. 532) established that the constitutionality of a regulation of picketing does not depend on whether the objective against which the picketing is directed is declared to be illegal by the legislature or the courts, or whether it is enforced by criminal or civil sanctions. These elaborations were not based on the view that

[15] The citation of *Bridges* v. *California,* 314 U.S. 252, 263, in the portion of *Giboney* just quoted is particularly significant, for Justice Black there stated:

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow. [Footnote omitted.]

picketing is entitled to a lesser status under the First Amendment than other means of communication. (See *Hughes,* 339 U.S. at 466-467; *Gazzam,* 339 U.S. at 540.) And neither those decisions nor any others through *American Radio Assn.* v. *Mobile S.S. Co.*, 419 U.S. 215, purported to undertake a doctrinal reevaluation of *Giboney.* Nevertheless, these cases expanded the scope of government authority to regulate picketing.

In understanding and evaluating this development, it is informative, we believe, to note the following hierarchy. Picketing, like any other form of speech, can be used to request its audience: (1) to commit an unlawful act that results in placing economic pressure on a third person to commit an additional act that is also unlawful; (2) to commit an unlawful act that results in placing economic pressure on a third person to commit an additional act that is lawful; (3) to commit a lawful act that results in placing economic pressure on a third person to commit an additional act that is unlawful; (4) to commit a lawful act that results in placing economic pressure on a third person to commit an additional act that is lawful but against a public policy; (5) to commit a lawful act that results in placing economic pressure on a third person to commit an additional act that is lawful and is not against any public policy. The first of these describes *Giboney;* the three intermediate examples state the fact situations that have been confronted by the Court in its post-*Giboney* decisions; and the last is the instant case.

A finding of a violation in the first two situations noted, fits within normal First Amendment doctrine, as *Giboney* shows. The next three variations, however, present considerably greater perplexities. It is entirely mysterious to us, for instance, why the government should be able, con-

sistent with the First Amendment, to ban speech asking consumers not to deal as is their right with an employer who employs few minorities or is non-union on the theory that to do so is to permit the speaker to unlawfully coerce the employer into denying his employees their *right* to non-discriminatory treatment (or free choice of a representative) *if* the employer may, of his own volition, deny those "rights" and the law gives those employees no remedy. That, we submit, is to use the terms "unlawful object", "employee rights" and "public policy" in a highly ideosyncratic manner to mask a deprivation of free speech in order to protect the interests of the employer. (Compare *Va. Pharmacy Bd., supra.*)

But, be that as it may, it is perfectly plain that to extend the *Giboney* theory to the fifth situation—which is the instant case—is to violate the Chief Justice's reminder in *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123, 127:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

And by doing so to sanction the absolute ban on picketing rejected in *Thornhill* and *Newell.* Against this background we consider the post-*Giboney* cases.

In *Hughes* v. *Superior Court* picketing of a store was designed to cause a consumer boycott which would compel the store owner to institute a racial quota hiring policy that was illegal under the California Supreme Court's decision in

James v. *Marinship Corp.*, 25 Cal.2d 721, 155 P.2d 329 & *Williams* v. *International Brotherhood of Boilermarkers*, 27 Cal.2d 586, 165 P.2d 903.[16] This Court's opinion in *Hughes*, quoted at length from the California Supreme Court's opinion in the same case, enlarging upon *Marinship:*

> "It was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned in the Marinship case, *supra* (25 Cal.2d 721, 737, 745). The fact that those seeking such discrimination do not demand that it be practiced as to all employes of a particular employer diminishes in no respect the unlawfulness of their purpose; they would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object." 32 Cal.2d at 856, 198 P.2d at 889. [339 U.S. at 463-464.]

The *Hughes* opinion does not state whether California's policy against quota hiring was enforceable by any sanctions, civil or criminal. In one passage the Court says that the State could enjoin picketing to compel violation of that

[16] In *Marinship* the California Supreme Court held:

> [T]hat a union which holds a closed shop contract or other form of labor monopoly must admit Negroes "to membership under the same terms and conditions applicable to non-Negroes unless the union and the employer refrain from enofrcing the closed shop agreement against them" * * * [and issued a] judgment awarding a preliminary injunction which "was clearly intended to do no more than eliminate discrimination upon the basis of race, and color alone". [25 Cal. 2d at 730, 745].

policy by the employer even though it does "not forbid the employer to adopt such a quota system of his own free will." (*Id.* at 468.) [17] *Hughes* was therefore read by Professor Cox as stating:

> Picketing may be prohibited where its objective is "unlawful" in the sense that the employer's capitulation would result in violation of a public policy declared either by the legislature or the courts. This is the clear holding of the *Giboney, Gazzam* and *Hughes* cases, and it appears to command unanimous acceptance from the Court. Nothing to the contrary was decided by earlier precedents. [Cox, *Strikes, Picketing and the Constitution*, 4 Vand.L.Rev. 574 (1951)] [18]

Of the post-*Hughes* cases our adversaries rely heavily on *Electrical Workers* v. *Labor Board*, 341 U.S. 694, 705 (*Langer*), the previous First Amendment case involving the secondary boycott provisions of the NLRA.[19] *Langer* sustained the constitutionality of a ban on picketing which

[17] If that is what *Hughes* decided it was an unacknowledged expansion of *Giboney*. We note, moreover, that in discussing the sentence in which this passage appears, we show *inter alia* that the propositions stated therein were not supported by any decisions interpreting the First Amendment, see p. 76, *infra*.

[18] In *Gazzam*, the Court said:

> Here, as in *Giboney*, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the State. That state policy guarantees workers free choice of representatives for bargaining purposes. If respondent had complied with petitioners' demands and had signed one of the tendered contracts and lived up to its terms, he would have thereby coerced his employees. [339 U.S. at 540.]

In describing a third case decided on the same day, *Teamsters Union* v. *Hanke*, 339 U.S. 470, Professor Cox stated that *"Hanke* appears to hold that picketing may be enjoined where the use of organized economic power against weaker members of the community will have undesirable social and economic ecnsequences. But

sought to induce members of building trades unions to strike against their own employer in order to compel him to cease doing business with another employer. As the Court held in the companion *Denver Building* case, which was followed on this point in *Langer* (341 U.S. at 699-700) "a strike with such an object was an unfair labor practice within the meaning of 8(b)(4)(A)".[20]

Thus, the Court rejected the First Amendment claim:

> The substantive evil condemned by Congress in 8(b)(4) is the secondary boycott and we recently have recognized the constitutional rights of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise. [341 U.S. at 705, omitting n. 10 which cited *Giboney* and the 1949 Term trilogy.][21]

In the 1951 article previously quoted, Professor Cox stated also:

> It is still unsettled whether picketing may be forbidden when its objective is "unlawful" only in the Pickwickian sense, that although there is no policy opposed to the union's attaining its objective by other means, the court (or legislature) deems it insufficient

since only three justices joined with Mr. Justice Frankfurter in the prevailing opinion, the issue may still be open." (4 Vand.L.Rev. at 599.)

In *Hanke*, the union's objective was to compel a self-employed person to join the union, contrary to the policy of the State of Washington as declared by its State court. Three of the eight Justices participating considered the case to be distinguishable from *Giboney* and would have held the ban on picketing to be unconstitutional. They may well have been right. The constitutional standard which Justice Frankfurter applied in the prevailing opinion is plainly contrary to that declared by other cases for determining the constitutionality of a restraint on communication. See p. 77, *infra*. But if the statutory or common law of Washington forbade concerted refusals to work in order to compel a self-employed person to join a union (as does § 8(b)(4)(A) of the NLRA, to which *Hanke* referred (*id.* at n. 5), then picketing to induce union members to refuse to make deliveries or to pick up from such an employer could constitutionally be prohibited. While the Washington Supreme Court did not declare that such concerted refusals are unlawful, such a rule would appear to be implicit in the State's policy, as declared in *Hanke*, to protect such employers.

[19] Bd. Br. 22; Safeco Br. 29; C. of C. Br. 14, 16.

[20] *Labor Board* v. *Denver Building Council*, 341 U.S. 675, 689. Under the 1959 amendments, former § 8(b)(4)(A) is now set forth, in this respect, in § 8(b)(4)(B).

[21] In *Plumbers Union* v. *Graham*, 345 U.S. 192, the object of the picketing was for the purpose of compelling a general contractor to eliminate non-union men from a construction job, although Virginia's right to work statute "provides in substance that neither membership nor non-membership in a labor union shall be made a condition of employment * * * and that a person denied employment because he is either a member of a union or not a member of a union shall have a right of action for damages". *Graham*, 345 U.S. at 200, quoting *Finney* v. *Hawkins*, 189 Va. 878, 880, 54 S.E. 2d 872.

In *Teamsters Union* v. *Vogt, supra*, the picketing had been found by the Wisconsin Supreme Court to be for "an unlawful purpose" because the state statute "made it an unfair labor practice in concert with others, to 'coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights . . . or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.' " (354 U.S. at 286-287.)

In *American Radio Assn., supra*, the state had a policy against "unlawful interference" with an employer's business which this Court observed was "analogous to the federal policy of prohibiting secondary boycotts, and is based on similar considerations". (419 U.S. at 231.) (See also the opinion of the Alabama Supreme Court, 291 Ala. 201, 210-213; 279 So.2d 467, 475-477, particularly its quotation of *Superior Derrick Corporation* v. *National Labor Relations Board*, 273 F.2d 891, 897, 2506 (C.A. 5), which holds that the NLRA's prohibition against secondary boycotts includes concerted work stoppages by employees of neutral employers (see Bd. Br. 21, Safeco Br. 19).

> to justify injuring the employer's business and causing loss and inconvenience to the public.[22]

As we have emphasized, there is no law or public policy which is opposed to a retailer's refusal to sell a struck product. Nor is there any law or public policy against consumers' refusing to buy a struck product. Thus, the picketing here can be found to be for an "unlawful" object only in the Pickwickian sense, questioned by Professor Cox, and which, as we have shown, is wholly foreign to the First Amendment.

3. The second reason that picketing in this case is constitutionally protected is that it was addressed solely to the general public.

a. *Hughes* v. *Superior Court, supra* is the only case which has sustained an injunction against picketing which was not addressed, at least in part, to organized workers. Of course, the Court was aware of that difference between *Hughes* on the one hand and *Giboney* and the two labor picketing cases which were decided together with *Hughes*. Justice Frankfurter's opinion for the Court, however, did not distinguish between picketing addressed to employees and picketing addressed to consumers. Rather, that opinion contains certain statements characterizing picketing generally. Since our adversaries' argument for constitutionality rests largely on these statements, we shall analyze their meaning and validity at some length. At 339 U.S. 465, quoted at Safeco Br. 18-19, the following appears:

> Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences,

[22] 4 Vand.L.Rev. at 599.

> and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.

That statement is accurate where picketing is addressed to union members who are subject to discipline as in *Giboney*. And it appears to have been the Court's perception that the situation in *Hughes* was indistinguishable because "At the time in controversy, about 50% of the customers of the Canal store were Negroes * * * [and] the Canal store was systematically patrolled by pickets carrying placards stating that Lucky refused to hire Negro clerks in proportion to Negro customers". (339 U.S. at 461.) These seem to have been the controlling facts to which Justice Frankfurter referred, at the close of his opinion. "We do not go beyond the circumstances of the case." (*Id.* at 469.) And we readily grant that the statement is accurate, too, whenever there is "a picket line" where by sheer force of numbers the pickets are likely to have an intimidating effect on consumers. But there is no basis whatsoever for the assumption that one or two individuals peacefully carrying placards addressed to consumers without blocking their entrance to a store evoke a loyalty or response which is not due to the verbal message of the placard.[23] It is particularly improper to indulge such an assumption to deny use of a chosen "mode[ ] of communication" (339 U.S. at 465). For, as the opinion in *Hughes* cautioned, "Generalizations are treacherous in the application of large constitutional concepts." (*Id.* at 469.) And *Hughes* was not intended to deny constitutional protection to all consumer

[23] Plainly, neither the Board's General Counsel nor Safeco presented any evidence that any of the prospective customers of the picketed land title companies were intimidated or overreached by the picket signs.

picketing, as is shown by *Teamsters Union* v. *Newell, supra,* 356 U.S. 341, in which the Court (including Mr. Justice Frankfurter) was unanimous.

b. Professor Cox, in the article referred to earlier, criticized the reasoning of *Hughes* and drew the distinction between picketing addressed to employees and picketing addressed to consumers in terms which, we submit, better portrays the realities of the situation, and contains a sounder constitutional analysis:

> But despite this common economic purpose of virtually all picketing, a sharp distinction between various kinds of picketing may be drawn according to (1) the basis of its appeal for support and (2) the character of the audience to which the appeal is addressed. Freedom of speech is an ideal born during the enlightenment out of the faith that men can progress by the use of reason if ideas are freely interchanged to be tested by debate and experience. Nor can we seek to judge between appeals to reason and bare slogans arousing prejudice or emotion. Much of our constitutional law grows out of this philosophy. Discussion may be curtailed if, but only if, a "clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." But if the speaker goes beyond discussion and invokes sanctions to support his words, he cannot claim the same constitutional protection. For this reason an employer may speak freely on labor questions but if he does not leave his ideas to seek approval on their merits and instead of this invokes fear of his economic power to induce obedience, the constitutional privilege is exceeded and the state may intervene. "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee."

It is from this standpoint that the term "peaceful picketing" covers too broad a range of conduct to have constitutional significance. The International Brotherhood of Teamsters has made wide use of its ability to shut off the flow of supplies into an establishment, or to stop the movement of its products, merely by posting a single picket at each driveway normally used by incoming or outgoing trucks. Other unions exercise similar power not by appealing to the public but because of the discipline of their members. The critical point, however, is not the success of such tactics but the fact that the union members respect the picket line because of a group discipline based partly on common loyalties, partly on the force of habit, partly on fear of social ostracism but also on severe economic sanctions. The truck driver who crosses a teamsters' picket line is subject not only to union fines but also to expulsion, and in the trucking industry suspension or expulsion from the union may carry with it loss of employment. * * * In such cases picketing is not merely a method of self-expression or of securing publicity, nor are the pickets seeking to secure adherents by persuading others of the truth of what they have to say. The picket's reliance in such a case is on the sanctions inherent in the discipline and organized economic power of his union.

Quite different is the peaceful picketing which is directed primarily to the general public. Familiar illustrations may be found outside motion picture theatres, restaurants, and beauty parlors where none of the employees are on strike. Theoretically such a picket line is entitled to the same respect from union members as any other picket line, but as a practical matter the same economic sanctions play little part. Prospective patrons who are not union members are left free to determine their own course of conduct influenced but not coerced by the knowledge that a labor dispute is in progress.

In such cases, therefore, the success or failure of pickets' appeal depends primarily upon the persuasiveness of their message.

This distinction between picketing backed by the threat of economic punishment and picketing which appeals only to reason, loyalty and other emotions is paralleled by a difference in the audience which the pickets seek to reach. The Teamsters' picket line is rarely addressed to individual members of the public. Its primary, and often exclusive purpose is to notify union members and members of affiliated unions that they must not work in the picketed establishment, or pick up or deliver goods, because their unions are engaged in bringing economic weapons to bear on the employer. Despite its element of publicity and propaganda, therefore, such picketing may be fairly described as the signal by which the union invokes its economic power. The pickets patrolling in front of a retail establishment are also bringing economic pressure against the business—and in this respect the case is the same—but their appeal is addressed to the public and the members of the public decide chiefly as individuals whether to patronize the establishment or to support the pickets' cause. Thus the publicizing is the primary element and the disciplined economic power of the union is an insignificant factor.

In caricature the lines are always sharper than in life. The multitude of picketing cases falls between these two extremes in the range of activities covered by "peaceful picketing." The same picket line usually appeals both to public opinion and to group discipline backed by economic sanctions. The relative importance of the two appeals varies from case to case, presenting such nice questions of classification that from time to time the differences may be obscured. It is submitted, however, that the distinction is practicable and that the constitutional decisions in picketing cases should depend, in part, on whether the "publicity" or "signal"

aspect predominates. [Cox, *Strikes, Picketing and the Constitution, supra,* 4 Vand.L.Rev. at 593-595 (footnotes omitted).]

Professor Cox continued: " 'Signal picketing' is entitled to no greater constitutional protection than the combination it sets in motion". He observed that *Giboney, supra,* decided this precise point and expressly noted the Court's heavy reliance on *Virginia Electric Co.* v. *Board,* 319 U.S. 533, and *Thomas* v. *Collins,* 323 U.S. 516, see p. 52, *supra.* Professor Cox also criticized the *Hughes* opinion for failing to distinguish between "signal" and "publicity" picketing. (*Id.* at 595-597, 599-602).[24]

c. Safeco's brief (at 24) relies also on *Hughes'* reference to "the compulsive features inherent in picketing beyond the aspect of mere communication as an appeal to reason" (339 U.S. at 468).

If by the contrast between "compulsive features" and "appeal to reason" the *Hughes* Court sought only to exclude appeals which derive significant momentum from coercing the person or persons to whom the message is directed, that phrase, and the sentence in which it appears, are not inconsistent with First Amendment theory; they would then merely restate in summary fashion a basic point of the *Giboney* opinion and its approval of *Thomas* v. *Collins* and *Virginia Electric Power Co.* Whether on the facts in *Hughes* the picketing there was properly considered to have been coercive and in that sense a "signal" is, as we have said, questionable; but there is no finding by the Board, and no showing on this record, that the members of the general

[24] He also referred with approval to Justice Traynor's dissenting opinion in the Supreme Court of California in *Hughes,* which forcefully stated the same distinction. See *id.* at 596, n. 87.

public who were addressed by the picket signs in this case were coerced in any way—because they were in some relationship of the dependence to the union, because there were too many pickets or due to any other cause.

The contention on petitioners' side is rather that all picketing is inherently coercive. Neither *Hughes* nor any other decision of this Court has held that this is so. Indeed, to hold that all picketing inevitably has compulsive features which outweigh its use as a means of communicating ideas would be to hold, on the view of the First Amendment discussed in this paragraph, that no picketing is entitled to constitutional protection. But to do so would be no more justifiable than to hold that because some speeches by employers to their employees are unprotected by the First Amendment, "tak[ing] into account the economic dependence of the employees on their employers" (*NLRB* v. *Gissel Packing Co.*, 395 U.S. at 617), Congress may outlaw all such speeches.

If *Hughes* states the general proposition that a communication loses First Amendment protection if it does not constitute "an appeal to reason" then the opinion is contrary to both the earlier and later precedents in this Court. *Stromberg* v. *California*, 283 U.S. 359, struck down a provision of the California Penal Code which made it a felony to:

> display a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government. [*Id.* at 360.]

Chief Justice Hughes wrote:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. [*Id.* at 369-370.]

Although the display of a red flag as a symbol of peaceful and orderly opposition to government cannot be considered an appeal to reason in the sense of an elaborate political tract or in any other sense which distinguishes it meaningfully from a picket sign urging consumers not to purchase a particular product, display of the flag was deemed to be within the protection which the Fourteenth Amendment gives to the "opportunity for free political discussion". So too, in *Spence* v. *Washington*, 418 U.S. 405, the Court held that the First and Fourteenth Amendments protected the display of the American flag upside down and with a peace symbol attached to the front and back (see *id.* at 406) was "a form of protected expression".[25]

The analogy between communication by flags and by signs carried by pickets was expressly recognized in *Thornhill's* companion case, *Carlson* v. *California*, 310 U.S. 106, 112-113:

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[25] Four members of the Court dissented in *Spence*. Both of the dissenting opinions rest on the unique characteristics of the American flag as a symbol of national unity. (*Id.* at 416, Burger, C. J.; *id.* at 423, Rehnquist, J.) Neither opinion expressed the view that the First Amendment was inapplicable, or that Spence's communication was entitled to less protection because it was only symbolic, and was not intended to evoke a reasoned response from those who saw the flag. Indeed, Justice Rehnquist's dissent would have sustained the state statute there in part because "Its operation does not depend upon whether the flag is used for communicative or non-communicative purposes." (*Id.* at 422).

> The carrying of signs and banners, no less than the raising of a flag is a natural and appropriate means of conveying information on matters of public concern. *Stromberg* v. *California*, 283 U.S. 359.

The placards in cases like this and *Tree Fruits* are no less "appeals to reason" than the "For Sale" and "Sold" signs which were constitutionally protected in *Linmark, supra,* (431 U.S. at 86.) Nor are they distinguishable in these terms from the placards, ubiquitous before election day, which announce: "Vote For X, Democratic Candidate for Y Office" perhaps with or without a picture of the candidate and/or a pithy characterization such as "honest, hard working, progressive". A prospective voter seeing such a sign is no more or no less informed about the election that a prospective purchaser of insurance would be informed about Safeco Title Insurance by the picket signs in this case. He (or she) will be persuaded to vote for "X" by reading such a placard if he is disposed to voting for the candidates of the Democratic Party, be it because of a life-long philosophic conviction, temporary pique at the Republican Party or some other ground.

So too, a prospective customer's favorable or unfavorable response to a picket sign requesting that he not purchase a particular product may depend on his "deeply held views on the role of organized labor in the free economic life of the Nation" (*cf. Carpenters' Union* v. *Labor Board,* 357 U.S. 93, 99-100), or his feeling of identification with (or opposition to) the particular group which is urging the boycott or its cause, be it higher wages, employment opportunities for Americans, racial equality, lamb prices, opposition to the South African government, etc. In each instance, the individual's decision to honor or not to honor the request will depend on the views which he carries with him when he sees the sign.

Thus, it is psychologically unsound, aside from being constitutionally irrelevant, to assume that a picket sign arouses in all or even a vast majority of those who see it an identical stimulus, irrespective of the individual's prior experience and values. And it is our basic thesis that as long as the individuals remain free to choose whether to buy or not to buy particular products, the First Amendment disables government from insisting that they make their decisions in ignorance of that which they, for good reason or bad reason or none at all, consider to be relevant. And it likewise disables government from forbidding those who wish to peacefully communicate with the consumers from doing so because government disapproves of what the consumers will do or because it fears that they will make their decision without "reason."

For the reasons just stated the banner and "For Sale" sign cases are very much in point. But there is one decision of this Court which on its holding and because of the force of its reasoning establishes beyond dispute that a communication may not be denied full First Amendment protection on the rationale that it does not constitute an "appeal to reason". That case, of course, is *Cohen* v. *California,* 403 U.S. 15.

The holding of that case, that Cohen's "vulgar allusion to the Selective Service System" (*id.* at 20) was fully protected by the First and Fourteenth Amendment, should alone be dispositive, as a matter of precedent, on this issue. For Cohen's three-word message was surely no more of an "appeal to reason" than was the picket sign in this case or any similar appeal to consumers not to purchase a particular product, for example, because it is manufactured under non-union or substandard conditions. It is well, however, to quote at length from Mr. Justice Harlan's analysis

in support of the holding in *Cohen* because it provides a reasoned refutation of the thesis that rational discourse is the only communication which is entitled to full protection under the First Amendment:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney* v. *California,* 274 U.S. 357, 375-377 (1927) (Brandeis, J., concurring).
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a triffling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as full as do Keats' poems or Donne's sermons," *Winters* v. *New York,* 333 U.S. at 507, 528 (1948) (Frankfurter, J., dissenting), and why "so long as the means are peaceful, the communication need not meet standards of acceptability," *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971).
>
> Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.
>
> Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. [403 U.S. at 24-26.]

While we cannot improve upon the foregoing, we do wish to emphasize two points. The first is that Justice Harlan recognized that "words are often chosen as much for their emotive as for their cognitive force" and that their entitlement to constitutional protection is not thereby diminished. The second is that "no readily ascertainable general principle exists" whereby the legislature or the courts could distinguish "appeals to reason" from other communications

which are the antithesis of such appeals whether they be characterized as appeals to emotion, unreason, or reflex response. Indeed, it would be an extreme form of censorship for any organ of government to take it upon itself to determine that a particular message is, or is not, an appeal to reason, and therefore is, or is not, entitled to constitutional protection. And the making of such decisions by government is not less offensive to the First Amendment if it is made on the basis of blanket categorizations of a particular form of communication such as a picket sign.

There is an additional, more general ground why the "appeal to reason" formulation cannot be considered to be authoritative in this case: Mr. Justice Frankfurter did not cite any free speech decisions to support this portion of his opinion. The "appeal to reason" phrase appears as part of a sentence [26] in a paragraph that cites a series of cases which declare the broad power of state governments under the Equal Protection Clause of the Fourteenth Amendment to legislate one step at a time in *economic* regulation.[27]

Thus the *Hughes* Court did not subject the decision of the California Supreme Court "to the critical scrutiny demanded under accepted First Amendment and equal protection principles" (*Bellotti,* 435 U.S. at 786-787 quoting *Buckley* v. *Valeo,* 424 U.S. 1, 11). The decisions discussed

[26] "If because of the compulsive features inherent in picketing, beyond the aspect of mere communication as an appeal to reason, a State chooses to enjoin picketing to secure submission to a demand for employment proportional to the racial origin of the then customers of a business, it need not forbid the employer to adopt such a quota system of his own free will." (339 U.S. at 468.)

[27] See also *id.* at 468-469 citing *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 46 which demonstrates the same rule vis-a-vis the federal government under the due process clause of the Fifth Amendment.

in Part II of this brief made clear that this difference in constitutional standards is critical. (See particularly *Erznoznik,* quoted at p. 35, *supra.*)

It is clear that in *Hughes* Justice Frankfurter applied not that standard, but a different standard more restrictive of the exercise of free speech, *viz.* that legislation is constitutional under the due process clause of the Fourteenth Amendment if it is consistent with the concept of "ordered liberty" as declared in *Palko* v. *Connecticut,* 302 U.S. 319, 327. (See *Hughes,* 339 U.S. at 464.) Mr. Justice Frankfurter's approach is more fully articulated, in this respect, in his opinion for four justices in the *Hanke* case which was decided the same day:

> It is not for us to pass judgment on cases not now before us. But when one considers that issues not unlike those that are here have been similarly viewed by other States and by the Congress of the United States, we cannot conclude that Washington, in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that Washington has offended the Constitution. [339 U.S. at 478-479, footnotes omitted.]

See also Justice Frankfurter's concurring opinion in *Kovacs* v. *Cooper,* 336 U.S. 77, 89-97 in which he rejects "the preferred position of freedom of speech" under the Constitution. Subsequent decisions in this Court have conclusively resolved this issue against Justice Frankfurter's views. But we need not pursue that controversy, because this case involves the constitutionality of an Act of Congress under the First Amendment as to which considerations of federalism do not come into play.

d. Central to Mr. Justice Frankfurter's approach to the

question of the constitutionality of regulations of picketing was, as the *Hughes* opinion shows, the fact that picketing is more than pure speech, and involves conduct as well. Subsequent decisions have established the following test which certainly was not applied in *Hughes*:

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety ofdescriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression;* and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [*United States* v. *OBrien,* 391 U.S. 367, 376-377, footnotes omitted, emphasis added.]

Here, unlike *O'Brien,* the governmental interest to be advanced in support of § 8(b)(4)(ii)(B) as construed by the Board "involved 'suppressing communication'" (*Buckley* v. *Valeo,* 424 U.S. at 17 quoting *O'Brien.*) Thus, as in *Buckley,* the ban on picketing cannot be sustained on the ground that it involves conduct. Rather, it must be judged by the constitutional standard that is established in the modern First Amendment cases such as those just discussed in Point IIIC, *supra.* An integral part of that First Amendment law is stated in the "decisions [which] have fashioned the principle that the constitutional guarantees of free speech

and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg* v. *Ohio,* 395 U.S. 444, 447). That is, as we have seen, the principle which was applied in *Giboney.* And since, in this case, the pickets did not advocate "the use of force or of law violation" but only a lawful decision by consumers not to purchase a product (so that, unlike *Giboney,* the picketing was not "directed to inciting or producing imminent lawless action"), the Board's order enjoining that picketing can not stand consistent with the First Amendment.

E. *Consumer Picketing Does Not Lose Its Constitutional Protection Because § 8(b)(4) Allows Other Methods For Communicating With The Public*

Both the Board and Safeco rely heavily on the fact that § 8(b)(4) does not outlaw appeals to consumers by means other than picketing. As this Court said in *Linmark,* this fact "is not without significance to First Amendment analysis, since laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether" (431 U.S. at 93). But as *Linmark* also illustrates, it is not a constitutionally sufficient ground for forbidding one means of communication that others are available. Rather, it must be demonstrated that the alternatives are not materially less effective forms of communication, and that the regulation is truly directed to time, place and manner rather than content. (See *id.* at 493-494.) Section 8(b)(4)(ii)(B), as construed by the Board, satisfies neither of these conditions.[28]

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[28] Of the six cases cited at Safeco Br. 26-27 for the sweeping prop-

First, the distribution of handbills to potential customers

osition "that the presence of alternative means of communication may sanction governmental regulation of speech", only two sustain a ban on that basis.

In *Lloyd Co.* v *Tanner,* 407 U.S. 551, 566-567 the record demonstrated that moving the distribution of handbills to public sidewalks from a privately-owned shopping center did not interfere with the respondent's ability to communicate with members of the public, and it was obvious that doing so would safeguard the shopping center owner's property rights. Thus, the Court concluded: "It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist." In the present case, however, there is no demonstration that the distribution of leaflets would be equally effective to convey the union's message, and that picketing creates a unique interference with interests which Congress sought to protect. Moreover, as made clear in *Hudgens* v. *NLRB,* 424 U.S. 507, 517-521 the basic holding of *Lloyd* was that the First Amendment does not apply to a private shopping center at all.

In *Pell* v. *Procunier,* 417 U.S. 817, the Court sustained a regulation by the State Department of Correction which forbade "press and other media interviews with specific individual inmates" at the prison (see *id.* at 819). The prison context of the regulation was decisive:

> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen," and that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise." *Preiser* v. *Rodriguez,* 411 U.S. 475, 492 (1973).
>
> In *Procunier* v. *Martinez,* [416 U.S. 396] we could find no legitimate governmental interest to justify the substantial restrictions that had there been imposed on written communication by inmates. When, however, the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as

"may be [a] less effective medi[um] for communicating the message that is conveyed by" the picket sign. This is not because, as Safeco argues, "picketing can accomplish something more than could be accomplished by pure speech alone" (Safeco Br. 27), but because a picket sign is easily seen and read by all who approach it. An additional advantage of a picket sign is that those who run may read. Handbills, by contrast, must be proffered individually, with the result that, at a busy location, the message will be communicated to only a small fraction of the potential consumers. To be sure, this difficulty could be overcome by having a large number of people hand out leaflets, but this would appear to be potentially more disruptive than a handful of

> security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, "prison officials must be accorded latitude." *Cruz* v. *Beto,* 405 U.S., at 321.

In *Martinez,* by contrast, the prison authorities had made no showing that their censorship of prisoner mail was "necessary to protect one or more of the legitimate governmental interests (in penal administration) identified" by the Court. (416 U.S. at 414). Those criteria were the following:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. [Id. at 413]

pickets, as in *Tree Fruits*. Indeed a communication by picket sign rather than by handbill does not necessarily entail any interaction between the person seeking to convey the information and those to whom it is conveyed, and is in that sense a lesser intrusion on the potentially unwilling auditor.

Second, § 8(b)(4)(ii)(B) cannot be justified, any more than could the ordinance struck down in *Linmark*, as a "time, place or manner" restriction. Rather:

> [Congress] has proscribed particular types of [picket] signs based on their content because it fears their "primary" effect—that they will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication, therefore, does not transform this into a "time, place, or manner" case. See, *e.g.*, *Erznoznik* v. *City of Jacksonville, supra; Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 510 (1969). If the ordinance is to be sustained, it must be on the basis of the township's interest in regulating the content of the communication, and no on any interest in regulating the form. [431 U.S. at 94.]

A suggestion of a "secondary effect" (*id.*) may be implicit in the Board's approving quotation of the portion of the dissenting opinion below stating the view that "'Read as barring only pickeing urging [a] total consumer boycott, . . . the statute strikes narrowly at those 'inherently compulsive features' present when consumers must cross a line." (Pet. App. 40a n.1, quoting *Honolulu Typographical Union No. 37* v. *NLRB, supra*, 401 F.2d at 957 n.11)" (Bd. Br., 23) We believe that Judge Leventhal's opinion in *Honolulu Typographical* cannot properly be read as announcing the principle that all picketing addressed to consumers necessarily has "compulsive features". In that

case "The union set up a picket line of from thirty to sixty persons who marched (shoulder to shoulder) in an ellipse across the front entrance to Market Place". (401 F.2d at 953.) Applying the merged product doctrine, discussed earlier herein, that court there said: "The only realistic meaning of the appeal is the traditional 'do not patronize this establishment'" (*id.* at 954). And if *Honolulu Typographical* even suggests that the possible discomfort of passing a few pickets by justifies an absolute ban on that form of communication, that suggestion has ben superseded by subsequent decisions in this Court.

Such a generalized concern about the potential effects of "picketing * * * as a class" is similar to that expressed by Chicago in *Mosley, supra*, about the supposed tendency of "non-labor picketing * * * to produce violence" (See 408 U.S. at 100.) The Court there replied:

> Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School District*, 393 U.S., at 508. Some labor picketing is peaceful, some disorderly; the same is true of picketing on other themes. [408 U.S. at 100-101.]

We would add that a rule which would ban picketing on the ground that it imposes a choice on members of the public would undermine constitutional protection for all uses of the streets as public forums. For a person who meets some-

one passing out leaflets, or seeking signatures on a petition, or making a speech, must either turn away from the latter, thereby signifying disapproval or unconcern, or else accept the invitation. This Court's opinion's have never suggested that speech may be suppressed to avoid such casual, momentary encounters.

As Mr. Justice Powell emphasized in *Erznoznik, supra:*

> When the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. See, *e. g., Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92 (1972); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953); *Kovacs* v. *Cooper, supra,* at 97 (Jackson, J., concurring). Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970), or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. See *Lehman* v. *City of Shaker Heights, supra.* As Mr. Justice Harlan cautioned:
>
> "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California,* 403 U.S., at 21. [422 U.S. at 209-210.] [29]

[29] *Albany Welfare Rights Organization* v. *Wyman,* 493 F.2d 1319, 1324 (C.A. 2), *cert. denied* 419 U.S. 838 cited at Safeco Br. 25, properly distinguished picketing from the distribution of handbills because of the *place,* namely a waiting room inside a building. The Court of Appeals there did

> not consider the right of privacy of the welfare recipients as a compelling consideration against First Amendment rights. We do not suggest that an AWRO representative would have the right to demand the name of a person on the waiting line if he chooses not to give it. But we cannot assume, on the other hand, that everyone on the waiting line would reject all communication with such representative. This is not an intrusion into the home, the church, or the voting booth. It involves simply talking to people who are waiting. Unless there is a showing that the listener has been badgered to the point of being made a captive, this intrusion on privacy in a public waiting room is slight against the heavy presumption in favor of free speech and assembly, which are preludes to the orderly redress of grievances. [493 F.2d at 1324]

Finally, it cannot be successfully maintained that picketing is uniquely subject to prohibition on the theory that this form of communication is more likely than other means to persuade customers not to purchase the struck product, and thereby to put pressure on the retailer not to sell it. For that is *not* a constitutionally sufficient basis for regulating "a form of communication protected by the First Amendment". (*Organization For a Better Austin* v. *Keefe,* 402 U.S. 415, 419.)

Mr. Chief Justice Burger wrote in *Keefe*:

> In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to "force" respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider* v. *State,* [308 U.S. 147]; *Thornhill* v. *Alabama,* 310 U.S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those

practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability. [402 U.S. at 419.] [80]

In sum, the First Amendment does not allow Government to protect "neutral" sellers or struck employers from the consequences of the public's informed exercise of its lawful option to purchase or not to purchase a struck product. "It is precisely this kind of choice between suppressing information, and the dangers of its misuse if it is freely available that the First Amendment makes for us." (*Va. Pharmacy Bd., supra,* 425 U.S. at 770.)

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[80] While *Keefe* involved leafletting, the principle there stated applies equally to picketing, which is also a protected "form of communication".

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

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